

**EXHIBIT A**

**ENVIRONMENTAL COVENANT AND ACCESS AGREEMENT**

AFTER RECORDING RETURN TO:

Laura Wishik, Esq.  
Director, Environmental Protection Section  
P. O. Box 94769  
Seattle, WA 98124-4769

GRANTOR AND OWNER:

City of Seattle  
address

HOLDER:

National Oceanic and Atmospheric Administration, on behalf of  
the Department of Commerce

United States Department of the Interior, on behalf of the U.S. Fish  
and Wildlife Service

The State of Washington, on behalf of The Washington  
Department of Ecology

The Muckleshoot Indian Tribe

The Suquamish Tribe

LEGAL DESCRIPTION  
OF THE REAL PROPERTY):

[LAT/LONG DESCRIPTION OF HABITAT  
RESTORATION PROJECT SITE PROPERTY  
(ATTACHMENT A)]

[AS DESIGNATED ON THE MAP ATTACHED  
TO THIS COVENANT (ATTACHMENT B)]

## EXHIBIT A

### **I. Purpose and Background**

This Environmental Covenant and Access Agreement (Covenant and Agreement) is made and entered into by the individual natural resource trustees who are members of the Elliott Bay Trustee Council, which is comprised of the Department of Commerce, on behalf of the National Oceanic and Atmospheric Administration (“NOAA”), on behalf of the Department of Commerce; the United States Department of the Interior, on behalf of the U.S. Fish and Wildlife Service; the Washington Department of Ecology, on behalf of the state of Washington; the Muckleshoot Indian Tribe; and the Suquamish Tribe (collectively, “the Elliott Bay Trustees” or “Trustees”) and the City of Seattle, Washington (“City,” “Grantor” or “Owner”) (together “the Parties” and individually as a “Party”).

The Trustees, under the authority of Section 107(f) of the Comprehensive Environmental Response, Cleanup and Liability Act (“CERCLA”), 42 U.S.C. § 9607(f); Section 1006(b) of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. 2706(b); and, 40 C.F.R. Part 300, subpart G, serve as trustees for natural resources for the assessment and recovery of damages for injury to, destruction of, or loss of natural resources under their trusteeship located in or proximate to the Lower Duwamish River, including the Lower Duwamish Waterway, Harbor Island Waterway and Lockheed West Site (hereinafter all three will be referred to as LDR).

The Lower Duwamish Waterway, which is part of LDR, is listed on the National Priorities List as a federal Superfund site, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9601 et seq. and as amended. Harbor Island and Lockheed West and its associated waterways are immediately downstream from the Lower Duwamish Waterway and these are also federal Superfund sites pursuant to CERCLA. The Trustees have carried out and/or are carrying out damage assessments for the LDR and anticipate bringing claims for damage to natural resources under CERCLA.

The Grantor owns the property described in Attachments A and B located in or proximate to the LDR in Seattle, Washington (hereinafter referred to as “the Property”).

Bluefield Holdings, Inc. (“Bluefield”) is a business entity that designs, builds, and maintains natural resource restoration and enhancement projects on behalf of persons that are liable for natural resource damages at properties that have been identified as Superfund sites

## EXHIBIT A

and/or otherwise suffer a loss of natural resources pursuant to CERCLA. Such Projects may be assigned ecological credit to be sold to potentially responsible parties liable for natural resource damages along the LDR.

The City of Seattle is working collaboratively with Bluefield to generate natural resource restoration and enhancement projects on properties owned by the City and located in or proximate to the LDR. Such collaboration is documented through the Master Lease Agreement executed between Bluefield and the City of Seattle on February 23, 2009, and approved by the City Council on June 30, 2008 (hereinafter Lease and attached hereto as Attachment C). Ordinance Number 122729 (Attachment C) authorized the Lease and issued a ten year Street Use Permit, (Use Permit and set forth in Attachment D) to Bluefield to facilitate Bluefield's of design, construction, and maintenance of the natural resource habitat restoration project described in Attachment E and which is to be constructed on the Grantor's Property.

The project term under the Lease between Bluefield and the City for each of the Candidate Parcels is for 24 months or completion of the construction of each Project, whichever is sooner, and continues for an additional ten years after completion of construction of the Project as authorized by the Use Permit. Upon expiration of the Lease, the City will maintain the Project in perpetuity consistent with the rights, obligations and terms set forth below.

NOW, THEREFORE, in consideration of the foregoing recitals the Parties mutually agree as follows:

### **II. Conveyance and Covenant**

This instrument grants a valid and enforceable environmental covenant pursuant to the Washington State Uniform Environmental Covenant Act, RCW Chapter 64.70 *et seq.*, (the Act) imposing certain conditions and restrictions on real property located in King County, Washington. The covenants and access rights granted in this instrument are required conditions as a result of the Project being established along the LDR by Bluefield pursuant to the procedures set out in the Natural Resource Restoration and Enhancement Credit Protocol (Protocol) attached as Attachment F.

Grantor covenants to the Holder and its assigns that Grantor holds a fee simple or other

## EXHIBIT A

real property interest in the Property that allows Grantor to enter into and comply with this Covenant and Agreement.

With this Covenant and Agreement, Grantor hereby binds Grantor, its successors, and assigns, to the restrictions and conditions set forth herein, and conveys to the Holder full rights provided by RCW Chapter 64.70 to enforce the restrictions, conditions, or other rights set forth herein.

Grantor makes the following covenant as to limitations, restrictions, and uses to which the Property may be put and specifies that such covenants shall run with the land, as provided by law, shall be perpetual, and shall be binding on all parties and all persons claiming under them, including the Owner of any portion of or interest in the Property:

1. The Property is designated to be used for the Project as set forth in Attachment E, and any authorized uses of the Property cannot be inconsistent with the habitat restoration requirements described therein.

2. The Property or portion thereof is identified as the location the Project as set forth in Attachment E and, except as provided in Paragraph II.3 below, any authorized use of the Property cannot be inconsistent with the habitat restoration requirements described therein.

3. The Property or a portion of the Property subject to this covenant is legally designated as a City Right of Way (“ROW”) whose primary use is for transportation purposes. The habitat project will be complementary to and will coexist with the ROW use. Further, by making this covenant, the City does not abrogate its obligation, duty or authority to use the Property for transportation purposes, and to that end, nothing in the covenant shall be construed to limit the City’s right and authority to add new transportation improvements or structures, and/or conduct maintenance and repair, reconstruction and/or replacement work on any improvements and/or structures currently existing on or adjacent to the Property so long as upon completion of the work, the City causes to be restored or replaced the ecological value and function that was impacted by such work.

4. Except as provided in Paragraph II.3 above, all of the following activities are strictly prohibited: any activity that interferes, damages or disturbs the integrity or maintenance of the Project; any activity that would degrade or diminish the ecological values of the habitat or its function as a habitat; any activity that causes the release or exposure to the environment of any

## EXHIBIT A

hazardous substances at the Project; or any activity that would otherwise interfere with the Project such that it would adversely affect the likelihood of success of the Project located on the Property. Some non-exclusive examples of activities that may be prohibited in the habitat restoration projects based on the foregoing criteria include the following: dredging, or excavating, logging, land clearing, residential development, commercial development. Nothing in this section is to be construed to prohibit public access to the habitat restoration projects so long as such public access is accomplished in a manner that does not interfere with, damage or diminish the ecological value or function of the projects.

3. The Grantor must restrict leases to uses and activities consistent with this Covenant and Agreement and notify all lessees of the restrictions on the use of the Property.

4. No major maintenance or construction project shall be permitted on the Property without prior written notice to each of the Holders.

5. The Grantor shall allow authorized representatives of the Holders the right to enter the Property at reasonable times to undertake the following activities:

a. Evaluation or inspection of the Project, including but not limited to the monitoring and assessing progress on the construction, operation, maintenance and performance of the Project;

b. Verification of any data or information submitted to the Trustees;

c. Inspection and duplication of records, operation logs, contracts or other documents maintained or generated by the Grantor or its contractors hereafter retained to perform work undertaken pursuant to the Project; and

d. Conducting such tests, investigations or sample collections as deemed necessary to monitor compliance with the Project, investigate or assess contamination at or near the Property, or to assist in further identifying and quantifying natural resource injuries requiring restoration actions and in planning and carrying out further restoration actions. Such access includes reasonable access to adjacent properties owned and/or controlled by the Grantor where access may be necessary to effectuate the rights to access the Project and/or Property on which the Project is located, unless access to adjacent properties will create undue risk of physical injury or harm and/or will interfere with essential operations on the adjacent properties.

## **EXHIBIT A**

e. To the extent the Property is not open to public access, the Trustees shall provide 72 hour notice of the Trustees' desire to access the Property. Trustees have authority to enter freely and move about such Property at all reasonable times and for purposes of overseeing requirements of the Project.

6. The Grantor covenants that it will not sell the Property or its legal interest in a Property to any person or otherwise utilize the Property for purposes other than as a ROW as provided in Paragraph II.2., above, and the Project.

### **III. Reservation of Rights**

Grantor hereby reserves unto itself, its representatives, heirs, assigns, and successors all rights accruing from ownership of the Property that are not conditioned, restricted or prohibited by Section II.

### **IV. Enforcement**

Compliance with this Covenant and Agreement may be enforced pursuant to the Washington State Uniform Environmental Covenant Act. The Holders shall have full enforcement rights. Failure by any party to enforce compliance with this Covenant and Agreement in a timely manner shall not be deemed a waiver of the party's right to take subsequent enforcement actions.

### **V. Recordation**

Grantor shall record this instrument in the official records of King County, Washington or other such County in which the Property may be located and shall pay the costs associated with recording. The Parties shall take such actions and execute such additional documents, including copies of this Covenant and Agreement or a short form of such document as may be required to record evidence of this Covenant and Agreement for the Property.

### **VI. Bluefield Leasehold and Permit**

The Grantor and the Trustees agree that there is a mutual interest in ensuring that the Project is completed. In the event that Bluefield has sold any Interim Natural Resource Damage Credits, as that term is defined under Paragraphs 1.7.1, 3.1 and 3.2 of the Protocol, but is unable to fulfill its obligation to complete the Project, the Grantor agrees that the Trustees may, in the

## EXHIBIT A

Trustees' sole discretion, assume the same rights that Bluefield holds under the Lease and Permit issued for the habitat project on the Property. All rights held by Bluefield under the Lease that are necessary to complete the construction, operation, maintenance and stewardship of the Project on the Property, and only such rights, shall be the rights that the Trustees' may elect to assume.

Upon the expiration of the Lease with Bluefield, the Grantor will be responsible for maintaining vegetation and other habitat attributes, for controlling invasive vegetation and debris removal, and for undertaking corrective actions for any perturbation that affects the ecological integrity of the Project. The Parties' intention is that the Grantor will, as required by this Covenant and Agreement, maintain the ecological function provided by the Project by the Grantor in perpetuity.

### **VII. Termination and Modification**

This Covenant and Agreement may only be amended or terminated in accordance with the procedures and process contained in the amendment and termination provisions of the Washington State Uniform Environmental Covenant Act, RCW 64.70.100 and as set forth herein. Pursuant to Section 64.70.100 of the Act, the Trustees reserve the right to revise the Project as described in Attachment E. In the event that the Project is significantly altered, revised or otherwise changed, the Grantor will record a description of the modified Project along with an amended Covenant and Agreement.

### **VIII. Miscellaneous**

1. Covenant Limitations. This Covenant and Agreement shall not be used as evidence of the Grantor's alleged liability in any action or proceeding other than an action or proceeding to enforce the terms of this Covenant and Agreement.

2. Failure by the City to Comply with this Covenant and Agreement. If the Grantor fails to comply with any of the terms and conditions of this Covenant and Agreement, the Holders have the right to enforce the environmental covenants noted herein pursuant to the Washington State Uniform Environmental Covenant Act, RCW 64.70 *et seq* to enforce the environmental covenants noted therein.

**EXHIBIT A**

3. Sale or Conveyance of a Candidate Parcel/Project Site by the City. Pursuant to the terms and conditions of this Covenant and Agreement, the Grantor agrees that it will not sell or otherwise relinquish its interest in the Property, but will hold its interest in the Property and preserve the Property so as to maintain the integrity of the Project in perpetuity.

4. Notices. Whenever notice is required to be given or a document is required to be sent by one Party to another under the terms of this Covenant and Agreement, it will be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified constitutes complete satisfaction of any written notice requirement of the Covenant and Agreement for the Parties:

As to the United States and as to the Trustees:

Craig O’Conner  
Special Counsel  
General Counsel of Natural Resources  
National Oceanic and Atmospheric Administration  
7600 Sand Point Way  
Seattle, WA

As to the City:

Judith Noble  
Strategic Advisor Corporate Policy and Performance  
Seattle Public Utilities  
700 5th Ave. Suite 4900  
PO Box 34018 Seattle WA 98124-4018  
e-mail: [judith.noble@seattle.gov](mailto:judith.noble@seattle.gov)  
Phone: 206-684-8078

and to:

Laura Wishik  
Director, Environmental Protection Section  
Seattle City Attorney's Office  
P.O. Box 94769  
Seattle, WA 98124-4769  
e-mail: [laura.wishik@seattle.gov](mailto:laura.wishik@seattle.gov)  
Phone: 206-684-8199



## **EXHIBIT A**

5. Entire Covenant and Agreement. This Covenant and Agreement, inclusive of all Attachments, contains the entire agreement between the Parties as to the subject matter hereof and supersedes all other agreements.

6. Obligations. To the extent there are any conflicts between the terms and obligations of the Lease and those of the Covenant and Agreement, the terms and conditions of the Covenant and Agreement control.

### **IX. Agreement by the City to Add Restrictive Covenants, Conservation Easements or Other Limitations on Use or Development Upon Request.**

If the Trustees determine that the Property covered by this Agreement require protections in addition to those afforded under this Agreement by the Washington State Uniform Environmental Covenant Act, then the City shall implement such protections requested by the Trustees, so long as the scope of those protections are reasonable and conform to the rights retained by the City in Section II.2. of this Agreement and the City has legal authority to implement such additional protections. The Trustees may request such additional protections based on any legal authority available to the City, including but not limited to common law authorities.

### **X. Signature and Acknowledgements**

Grantor covenants that it is authorized to grant this Covenant and Agreement and shall warrant and defend the same against all claims and demands challenging such authority. The undersigned parties represent and certify that they are authorized to execute this Covenant and Agreement.

**EXHIBIT A**

IN WITNESS WHEREOF, the City of Seattle, Grantor has executed this Environmental Covenant and Access Agreement on this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

Signatory's printed name \_\_\_\_\_

Signature \_\_\_\_\_  
City of Seattle

STATE OF \_\_\_\_\_)

COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged and signed in my presence on the \_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by the person(s) who appeared before me and who acknowledged it to be his/her/their free and voluntary act.

Name (signature) \_\_\_\_\_

Notary Public for the state of \_\_\_\_\_

My Commission expires on \_\_\_\_\_

Printed Name \_\_\_\_\_

The forgoing Environmental Covenant and Access Agreement is hereby approved and certified.

By: \_\_\_\_\_

On behalf of the Elliott Bay Trustees

Craig O'Connor, Special Counsel  
General Counsel for Natural Resources