



Meeting Date: May 22, 2017

Agenda Item No: _____

Kitsap County Board of Commissioners			
Office/Department: Prosecuting Attorney's Office and Public Works Department			
Staff Contact & Phone Number: Lisa Nickel 337-4974, Pat Campbell 337-4626			
Agenda Item Title: Settlement Agreement with Bremerton School District			
Recommended Action: Approve and Execute the Settlement Agreement			
Summary:	<p>This Agreement is to share the costs of remediation of contaminated property at the site of Crownhill Elementary School, a portion of which was owned by Kitsap County in the 1940's and 50's and used as a road shed. Bremerton School District (BSD) is under a 2015 Agreed Order with Ecology for the cleanup and monitoring of the site. Cleanup activities and costs are currently projected through the year 2045. This Settlement Agreement, without admitting liability, establishes that the County will annually pay no more than one-third of the actual costs incurred, which through 2045 are estimated to total \$816,883. This will include an initial payment of \$41,038 to cover work completed through 2016, and annual payments of approximately \$20,000-\$25,000 in current dollars (adjusted for inflation).</p> <p>The County and BSD have executed two previous Settlement Agreements for an initial cleanup of contaminated soils (1998) and a Remedial Investigation/ Feasibility Study (RI/FS) of the property (2012). This third Settlement Agreement is expected to cover the County's share of future cleanup activities.</p>		
Attachments:	Settlement Agreement between Bremerton School District and Kitsap Co.		
Fiscal Impact for this Specific Action			
Expenditure required for this specific action:	NTE \$816,883		
Related Revenue for this specific action:	N/A		
Cost Savings for this specific action:	N/A		
Net Fiscal Impact:	N/A		
Source of Funds:	Solid Waste Fund 415 (Landfill Closure Fund)		
Fiscal Impact for Total Project			
Project Costs:	NTE \$816,883 through 2045 (estimated)		
Project Costs Savings:	N/A		
Project Related Revenue:	N/A		
Project Net Total:	N/A		
Fiscal Impact (DAS) Review N/A			
Departmental/Office Review & Coordination			
Department/Office	Department Director		
Prosecutor	Jacquelyn Aufderheide		
Public Works	Andrew Nelson/Stella V. Vakarc		
Contract Information			
Contract Number	Date Original Contract or Amendment Approved	Amount of Original Contract Amendment	Total Amount of Amended Contract
N/A			

SETTLEMENT AGREEMENT
BETWEEN
BREMERTON SCHOOL DISTRICT AND KITSAP COUNTY

THIS SETTLEMENT AGREEMENT (“Agreement”) is entered into by and between Kitsap County (“County”), a Washington municipal corporation with its principal place of business at 614 Division Street, Port Orchard, WA 98366, and the Bremerton School District No. 100-C (“School District”), a Washington school district with its principal place of business at 134 Marion Avenue, Bremerton, WA 98312 (collectively “the Parties”).

I. RECITALS

A. WHEREAS, the School District owns property located at 1500 Rocky Point Road, Bremerton, WA 98312 on which the Crownhill Elementary School operates.

B. WHEREAS, in the early 1990s, contaminated soils were discovered at the Crownhill Elementary School Property (“Crownhill” or “Site”) during renovation work by the School District. The School District worked with the Washington State Department of Ecology (“Ecology”) under the Model Toxics Control Act (“MTCA”) to conduct soil investigations, partially remove contaminated materials, install protective measures and perform groundwater monitoring.

C. WHEREAS, in the late 1990s, the School District brought a contribution action against Kitsap County and the United States Department of the Navy (“U.S. Navy”), and the County brought cross claims against the Navy, in the case of *Bremerton School District No. 100-C v. The United States, Department of the Navy, and County of Kitsap Washington*, Cause No. C97-5140FDB in the U.S. District Court for the Western District of Washington. Without admitting liability or fault, the parties entered into a Settlement Agreement dated December 16, 1998.

D. WHEREAS, on June 17, 2010, Ecology issued a Potentially Liable Person status letter to the School District, pursuant to RCW 70.105D.040, -.020(21) and WAC 173-340-500, seeking to conduct further investigations at the Site based on long term monitoring.

E. WHEREAS, in September 2010, Ecology and the School District entered into an Agreed Order, No. DE 7916, “to provide for remedial action at a facility where there has been a release or threatened release of hazardous substances” (“2010 Agreed Order”). This facility is the Bremerton School District Crownhill Elementary School Site, Facility Site ID No. 99722456.

F. WHEREAS, the 2010 Agreed Order required the School District to conduct a Remedial Investigation and Feasibility Study (“RI/FS”) to determine the nature and extent of contamination associated with historical landfill activities underneath the Site and evaluate any remedial actions necessary. The RI/FS was completed by the School District and approved by Ecology in 2014.

G. WHEREAS, Ecology also required the School District to perform two Interim Actions in 2012 and 2013 to remove contaminated soil from the surface of the Crownhill Elementary Property and the Bremerton United Methodist Church Property to the south and cover deeper contaminated soil with clean soil.

H. WHEREAS, based on a reopener clause in the 1998 Settlement Agreement, on August 13, 2010, the School District asked for financial assistance from Kitsap County and the Navy.

I. WHEREAS, Kitsap County and the Navy disagreed on whether the reopener had been triggered and disagreed as to their obligation and liability regarding the Site. Nevertheless, Kitsap County and the School District negotiated a Settlement Agreement in 2012, pursuant to which Kitsap County paid \$48,131.56 as a one-third share of actual costs incurred and estimated costs to be incurred by the School District to perform the RI/FS.

J. WHEREAS, the actual cost to complete the RI/FS was higher than estimated. Moreover, there were additional interim actions required by Ecology before the establishment of final and ongoing activities in the Cleanup Action Plan (“CAP”) dated December 10, 2014 and imposed under a second Agreed Order signed in 2015 (“2015 Agreed Order”). The remediation activities include periodic removal of LNAPL from wells; periodic inspection and maintenance of the soil/sod cover and asphalt pavement over contaminated materials; running the HVAC system during the school day; periodic monitoring of indoor air quality; groundwater monitoring; and recording of Environmental Covenants at the Site. These remediation activities are described in the following documents:

- a. Cleanup Action Plan;
- b. Groundwater/LNAPL, Monitoring and Contingency Plan;
- c. LNAPL Removal Work Plan;
- d. Cover System Inspection and Maintenance Plan; and
- e. Environmental Covenants on the Crownhill Elementary School Property and the Bremerton United Methodist Church Property (recorded in 2015).

K. WHEREAS, the Cleanup Action Plan does not identify a “reasonable restoration time frame” and expects that the contamination will not naturally attenuate; nevertheless, in the event work under the 2015 Agreed Order is ongoing as late as 2045, the School District will request a determination from Ecology or its successor agency whether work is still necessary at the Site.

L. WHEREAS, the Parties wish to execute this Agreement without admission to responsibility, liability or fault of either Party, in furtherance of mutual cooperation among public entities to protect the public health and safety of local citizens, and without resorting to the time, cost and uncertainty of litigation.

II. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties mutually agree, represent, and warrant as follows:

1. Recitals. The above recitals are true and correct and are incorporated herein by this reference.

2. Definitions.

2.1 “1998 Settlement Agreement” or “1998 Agreement” shall mean that Settlement Agreement executed between the School District, the County and the United States Navy, effective

December 16, 1998, to settle *Bremerton School District No. 100-C v. The United States, Department of the Navy, and County of Kitsap Washington*, Cause No. C97-5140FDB.

2.2 “2010 Agreed Order” shall mean Agreed Order No. DE 7916, issued by Ecology and effective September 20, 2010.

2.3 “2015 Agreed Order” shall mean Agreed Order No. DE 11107, issued by Ecology and effective April 9, 2015.

2.4 “Agreement” shall mean this agreement, signed by the authorized representatives for each of the Parties as evidenced by the signatures below.

2.5 “2015 Agreed Order Plans” means the Groundwater/LNAPL, Monitoring and Contingency Plan; LNAPL Removal Work Plan; and Cover System Inspection and Maintenance Plan prepared by the School District as required under the 2015 Agreed Order and approved by Ecology, and any future Plans required by Ecology pursuant to the 2015 Agreed Order.

2.6 “Cleanup Action Plan” shall mean the Cleanup Action Plan issued by Ecology on December 10, 2014.

2.7 “Ecology” shall mean the Washington State Department of Ecology.

2.8 “Ecology Grant” shall mean the Remedial Action Grant Agreement G1100201 between Ecology and the School District, effective February 15, 2009, as well as any amendment, extension or subsequent grant issued by Ecology to the School District relating to the Site.

2.9 “Environmental Covenants” means the Environmental Covenants recorded on the Crownhill Elementary School Property and the Bremerton United Methodist Church Property in 2015.

2.10 “Interim Action” shall mean the Interim Actions performed by the School District in 2012 and 2013 in accordance with the Ecology-approved Interim Action Work Plan dated December 22, 2009, along with the associated reports.

2.11 “MTCA” shall mean the Washington State Model Toxics Control Act, Chapter 70.105D RCW, and the regulations at Chapter 173-340 WAC.

2.12 “Remediation Costs” shall mean costs incurred by the School District, including consultants’ costs and attorneys’ fees, and not reimbursed by an Ecology Grant, to implement the CAP, 2015 Agreed Order, and 2015 Agreed Order Plans, Environmental Covenants, and any other actions required by Ecology pursuant to these documents.

2.13 “RI/FS” shall mean the Remedial Investigation (“RI”) and Feasibility Study (“FS”) required by the 2010 Agreed Order, developed by the School District and their consultants, and approved by Ecology, with regard to quantifying the nature and extent of contamination at the site and the feasibility of remedies at the Site.

2.14 “Site” shall mean the Crownhill Elementary School property located at 1500 Rocky Point Road, Bremerton, Washington (Tax Parcel No. 152401-2-027-2005), plus the extent of

contamination on adjacent properties, in accordance with WAC 173-340-200. A map of the Site is attached as **Exhibit A**.

3. Responsibilities and Obligations

3.1 *Kitsap County*

3.1.1 Initial payment. The County shall pay to the School District the initial amount of **\$41,038**, which represents the County's one-third share of the School District's out-of-pocket expenses, after deducting funds obtained through an Ecology Grant, through December 2016. Payment under this section shall be accomplished by check payable to Bremerton School District 100-C and mailed in accordance with Section 6 within thirty (30) days of execution of this Agreement.

3.1.2 Annual payments. The School District shall transmit to Kitsap County an annual accounting and documentation of its Remediation Costs no later than January 31 of the next year. The estimated share of Kitsap County's annual costs associated with the first cycle and annually thereafter are set forth in **Exhibit B**, incorporated herein by this reference. The County agrees these are estimates and actual costs may differ, however, the School District agrees to notify the County at any point during the year when the actual costs are likely to exceed the "Maximum Anticipated Annual Cost" shown on Exhibit B.

The County shall have twenty (20) days from receipt to object to costs included in the annual accounting. Objections may be raised only on the basis that certain costs are not Remediation Costs as defined under this Agreement or such costs are unreasonably excessive. The Parties shall cooperate in good faith to resolve issues concerning Remediation Costs. Disputes regarding Remediation Costs shall be resolved pursuant to Section 8 below.

Within thirty (30) days of receipt of the annual accounting or, if necessary, resolution of any disputed issues, the County shall pay its one-third share of such costs by check payable to Bremerton School District 100-C and mailed in accordance with Section 6.

3.1.3 The County shall not be obligated to pay more than the above share in the event the Navy declines to contribute. In the event the County has paid more than \$816,883.00 in total under this Agreement, the School District will provide a detailed explanation why actual costs have exceeded the estimated total costs. At that time, and consistent with section 20 below, the Parties agree to negotiate in good faith an extension of this Agreement. Any disagreement between the Parties is subject to dispute resolution under section 8 below.

3.1.4 The County is not obligated to contribute funds for activity occurring before December 11, 2010, as per Section 9 the 1998 Settlement Agreement.

3.2 *Bremerton School District*

3.2.1 The School District shall keep the County informed of the actions the School District takes under the 2015 Agreed Order. This includes, but is not limited to:

(a) Sending to the County an annual accounting and documentation of its Remediation Costs no later than January 31 of the next year and notifying the County when actual costs are likely to exceed the "Maximum Anticipated Annual Cost" shown on Exhibit B.

(b) Sending to the County copies of all formal documents submitted to Ecology (e.g., quarterly progress reports, grant billings, etc.);

(c) Sending to the County copies of Ecology's comments on any document the School District submits to Ecology.

(d) Providing individualized notice of documents or comment periods required by law.

3.2.2 The School District shall provide the County, upon request, copies of any other non-confidential, non-privileged documents relating to the remedial action and cleanup of the Site, specifically including, but not limited to, Remediation Costs incurred by the School District.

3.2.3 The School District shall allow the County, its personnel or agents reasonable access to the Site to view the layout of the property or to attend any remediation work conducted by the School District at the Site. The County shall request permission prior to any visit.

3.2.4 The School District shall use all best efforts to carry out the terms of the 2015 Agreed Order in a professional and cost effective manner so as to not increase costs requested from the County.

5. Protection Against Claims. The Parties acknowledge and agree that the payments made by the County pursuant to this Agreement represent a good faith compromise of disputed claims and that the compromise represents a fair, reasonable, and equitable discharge of activities required under the 2010 and 2015 Agreed Orders. The School District thus hereby releases, discharges, covenants and agrees not to assert against the County any and all claims, including without limitation, all claims, debts, actions, damages and costs, contribution or otherwise, of any and all types, which it may have, or hereafter have arising out of the 2010 Agreed Order, CAP, 2015 Agreed Order, 2015 Agreed Order Plans, and Environmental Covenants that are covered by this Agreement. Provided, however, this release does not include potential claims by the School District against the County in the event Ecology issues either an amendment to the 2015 Agreed Order or a new Agreed Order based solely on contamination, whether or not identified in the CAP, that presents a previously unknown threat to human health or the environment and which requires additional remediation beyond what is already required in the CAP, 2015 Agreed Order, 2015 Agreed Order Plans, or Environmental Covenants, and which is attributable to the County's former ownership or operation at the Site.

With regard to any claims or potential claims for costs, damages or other claims against the County, the County is entitled to, as of the effective date of this Agreement, contribution protection pursuant to RCW 70.105D.080 and any other applicable provision of federal or state law, whether by statute or common law, extinguishing the County's liability to persons not a party to this Agreement for Remediation Costs. Any rights the County may have to obtain contribution or otherwise recover costs or damages from persons not a party to this Agreement are preserved.

6. Contact Persons

Any notice required or made with respect to this Agreement shall be in writing and shall be effective upon receipt. All approvals, requests, reports, notices, communications or other materials or

information to either Party hereunder shall be given to such Party at the following contacts and address, or such other contract address as such Party may hereafter specify in writing:

6.1 For Kitsap County:

Lisa Nickel, Civil Deputy
Kitsap County Prosecuting Attorney's Office
614 Division St. MS 35A
Port Orchard, WA 98366
Phone: (360) 337-4974
Fax: (360) 337-7083
Email: lnickel@co.kitsap.wa.us

With copies to:

Patricia Campbell
Kitsap County Public Works, Solid Waste Senior Program Manager
614 Division Street. MS 27
Port Orchard, WA 98366
Phone: (360) 337-4626
Fax: (360) 337- 5678
Email: pcampbell@co.kitsap.wa.us

6.2 For Bremerton School District:

Tod Gold
Joyce Ziker Parkinson, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, WA 98101
Phone: (206) 957-5953
Fax: (206) 957-5961
Email: tgold@jzplaw.com

With copies to:

Garth Steedman
Bremerton School District
134 Marion Ave N.
Bremerton, WA 98312
Phone: (360) 473-1000
Fax: (360) 473-1041
Email: garth.steedman@bremertonschools.org

7. Notice of Default and Right to Cure.

If any Party is in breach of the obligations under this Agreement and has failed to cure such breach within thirty (30) days after receipt of written notice of such breach, the non-breaching Party may invoke the dispute resolution requirements under Section 8 below.

8. Dispute Resolution.

Any dispute, controversy, difference, claim, or demand of any kind, under any theory, whether at law or equity, arising out of, with respect to, or relating to, payment of Remediation Costs or the execution, breach, interpretation, performance, termination, enforcement, or nonperformance, of this Agreement including without limitation, the validity, scope, arbitrability, and enforceability of this Agreement or any term or provision thereof, whether express or implied, or relating thereto (the Dispute), shall be resolved first by direct negotiation in good faith. If negotiation fails within thirty (30) days, or longer as agreed by the Parties in writing, the Parties may agree on a mediator to mediate the dispute. The mediation shall be non-binding on the Parties. In the event the mediation is not successful at resolving the dispute or mediation is not agreed upon, either Party shall have the right to proceed with any judicial remedies, including any mutually agreed arbitration process.

9. Successors and Assigns. This Agreement shall be binding upon the Parties and their respective successors and assigns, designees, officers, directors, employees, and agents.

10. Entire Agreement; Amendment; Severability. This Agreement constitutes the entire agreement among the Parties concerning the subject matter hereof. This Agreement may not be modified, in whole or in part, except upon unanimous approval of the Parties in writing and signed by all the Parties. If any provision of this Agreement is deemed invalid or unenforceable, the balance of this Agreement shall remain in full force and effect.

11. No Waiver. Except as set forth in this Agreement, the Parties reserve and do not waive any and all other legal rights and remedies.

12. No Joint Venture. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Parties, nor shall this Agreement confer any right or benefits on any person or entity not a signatory to this Agreement.

13. No Admission. This Agreement and the terms herein were negotiated and executed by the Parties at arms' length and in good faith, and is a fair and equitable compromise reached in order to avoid the expense of continued litigation. Nothing in this Agreement shall constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the Parties. Notwithstanding the contribution made by the County under this Agreement pursuant to MTCA, the County expressly denies any fault or liability related to the Site under MTCA, or any other applicable state, or federal statute, regulation or common law, and likewise denies any responsibility for response costs, remedial costs or any other costs or damages thereunder. The provisions, terms and conditions of this Agreement shall not be admissible in any action, except an action to enforce this Agreement, as an adjudication or finding or any issue of fact or law, or as an admission by any Party with respect to any issue.

14. Modification. This Agreement cannot be modified without the written consent of the authorized representatives of the Parties.

15. Headings. The headings used in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Agreement nor the intent of any provision thereof.

16. Governing Law. This Agreement, and all amendments or supplements thereto, shall be governed by and construed in accordance with the laws of the State of Washington.

17. Venue. Venue for any action arising out of this Agreement shall be in Superior Court of the State of Washington for Kitsap County.

18. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19. Authorization. The signatures set out below warrant and guarantee that the signers have been authorized to represent the Party and are acting as the Party hereof.

20. Effective Date and Duration. This Agreement shall be effective on the date of the last signature set forth below. This Agreement shall terminate: (1) upon completion of all work under the 2015 Agreed Order and the School District's final request for payment thereto or (2) upon the payment of annual fees for 2045 in accordance with Section 3.1.2. Provided, however, if work under the 2015 Agreed Order is ongoing in 2045, the School District will request a determination by Ecology or its successor agency whether such work is still necessary at the Site. If Ecology determines that work under the 2015 Agreed Order is still necessary, the Parties agree to negotiate in good faith to extend or modify this Agreement to address the County's share of any post-2045 costs. Any disagreement between the Parties is subject to dispute resolution under section 8 above. Nothing herein shall prohibit the parties from modifying or extending this Agreement in accordance with each party's procedure.

BREMERTON SCHOOL DISTRICT

**BOARD OF COUNTY COMMISSIONERS
KITSAP COUNTY, WASHINGTON**

AARON LEAVELL, Superintendent

CHARLOTTE GARRIDO, Chair

Date: _____

Date: _____

ROBERT GELDER, Commissioner

Date: _____

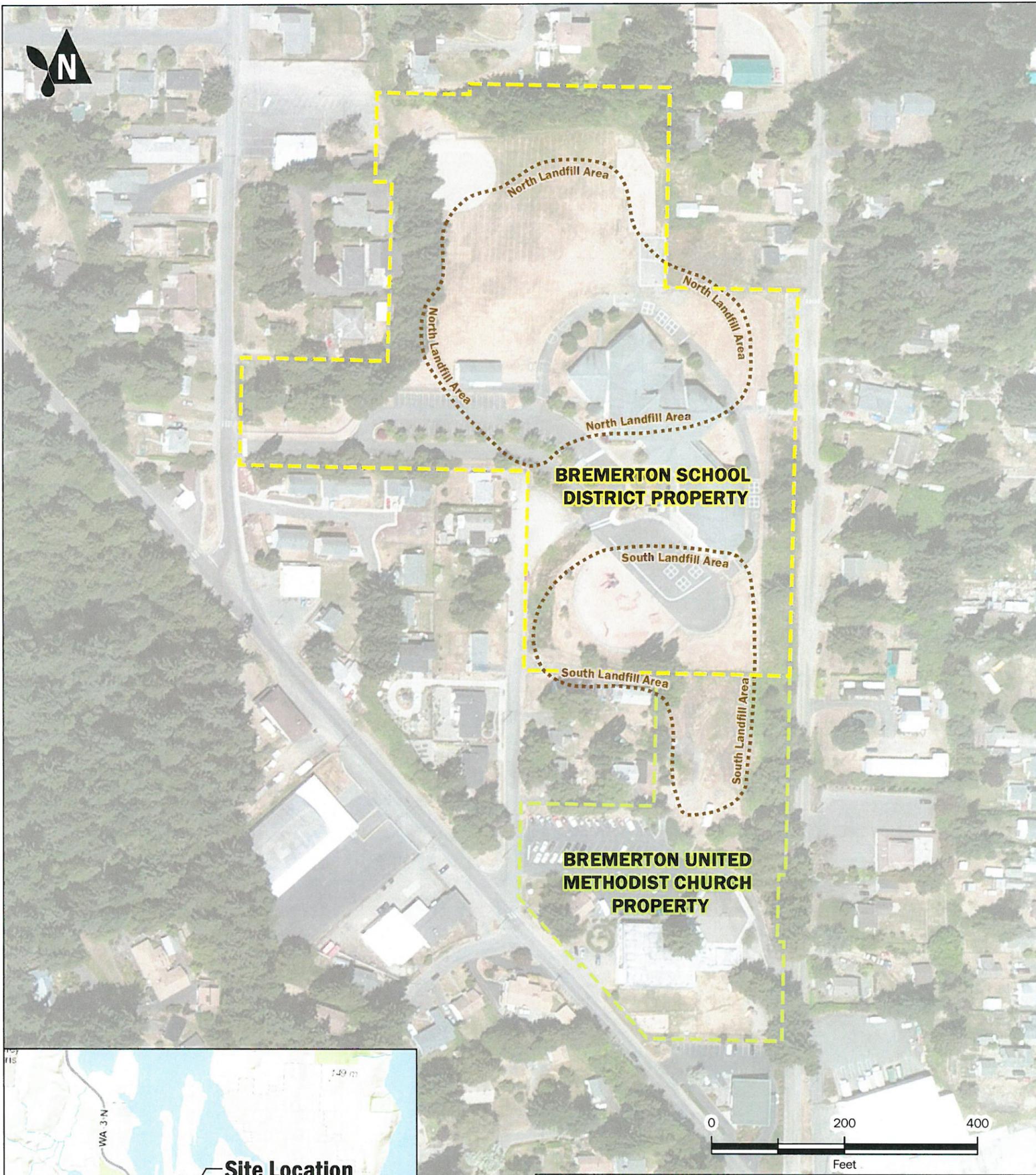
EDWARD E. WOLFE, Commissioner

Date: _____

ATTEST:

Dana Daniels, Clerk of the Board

Exhibit A – Map of Site



**Bremerton School District
Crownhill Elementary School Site**
Kitsap County, Washington

	SEP-2014	BY: RAA	FIGURE NO. 1
	PROJECT NO. 100094	REVISED BY: ---	

Baseemap Layer Credits | Sources: Esri, HERE, DeLorme, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), swisstopo, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community
Source: Esri, DigitalGlobe, GeoEye, i-cubed, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community

Exhibit B – Estimated Kitsap County Share of Future Remediation Costs

Exhibit B - Estimated Kitsap County Share of Future Remediation Costs

Crownhill Elementary School Site

Year	Kitsap County Share of Remediation Costs ¹	
	Estimated Annual Cost (Levelized) ²	Maximum Anticipated Annual Cost ³
2017	\$20,000	\$25,000
2018	\$20,400	\$25,500
2019	\$20,808	\$26,010
2020	\$21,224	\$26,530
2021	\$21,649	\$27,061
2022	\$22,082	\$27,602
2023	\$22,523	\$28,154
2024	\$22,974	\$28,717
2025	\$23,433	\$29,291
2026	\$23,902	\$29,877
2027	\$24,380	\$30,475
2028	\$24,867	\$31,084
2029	\$25,365	\$31,706
2030	\$25,872	\$32,340
2031	\$26,390	\$32,987
2032	\$26,917	\$33,647
2033	\$27,456	\$34,320
2034	\$28,005	\$35,006
2035	\$28,565	\$35,706
2036	\$29,136	\$36,420
2037	\$29,719	\$37,149
2038	\$30,313	\$37,892
2039	\$30,920	\$38,649
2040	\$31,538	\$39,422
2041	\$32,169	\$40,211
2042	\$32,812	\$41,015
2043	\$33,468	\$41,835
2044	\$34,138	\$42,672
2045	\$34,820	\$43,526
Estimated Total for Years 2017 - 2045	\$775,845	
Payment for Costs Through 2016	<u>\$41,038</u>	
Estimated Total Under this Agreement	\$816,883	

Notes:

- 1) The County share of remediation costs is one-third of actual costs. The "then-current" dollar amounts shown in this table assume a 2 percent annual inflation rate.
- 2) The estimated annual costs shown in this column are based on a "levelized" annual cost of \$20,000 in current (2017) dollars. This column provides the basis for the dollar cap stated in Paragraph 3.1.3.
- 3) The maximum anticipated annual costs shown in this column are based on a maximum annual cost of \$25,000 in current (2017) dollars. The School District will notify the County when an annual cost in a given year is likely to exceed the amount shown [refer to Paragraph 3.2.1(a)].

3/6/17