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Seattle, WA 98101



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Skagit County Auditor

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WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**

Peter Goldmark - Commissioner of Public Lands

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**AQUATIC LANDS LEASE**

**Lease No. 20-A11236**

Grantor: Washington State Department of Natural Resources

Grantee(s): Kona Residence Trust

Legal Description: Section 4, Township 34 North, Range 1 East, W.M.

Assessor's Property Tax Parcel or Account Number: P19059

Assessor's Property Tax Parcel or Account Number for Upland parcel used in conjunction with this lease: P19059

THIS LEASE is between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and KONA RESIDENCE TRUST, a Trust ("Tenant").

**BACKGROUND**

Tenant desires to lease the aquatic lands commonly known as Burrows Bay, which are tidelands and bedlands located in Skagit County, Washington, from State, and State desires to lease the property to Tenant pursuant to the terms and conditions of this Lease. State has authority to enter Lease under Chapter 43.12, Chapter 43.30 and Title 79 of the Revised Code of Washington (RCW).

THEREFORE, the Parties agree as follows:

SKAGIT COUNTY WASHINGTON  
REAL ESTATE EXCISE TAX

MAY 15 2012

Aquatic Lands Lease

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Amount Paid \$  
Skagit Co. Treasurer  
By *[Signature]* Deputy

Lease No. 20-A11236

## SECTION 1 PROPERTY

### 1.1 Property Defined.

- (a) State leases to Tenant and Tenant leases from State the real property described in Exhibit A together with all the rights of State, if any, to improvements on and easements benefiting the Property, but subject to the exceptions and restrictions set forth in this Lease (collectively the "Property").
- (b) This Lease is subject to all valid interests of third parties noted in the records of Skagit County, or on file in the office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.
- (c) This Lease does not include a right to harvest, collect or damage natural resources, including aquatic life or living plants; water rights; mineral rights; or a right to excavate or withdraw sand, gravel, or other valuable materials.
- (d) State reserves the right to grant easements and other land uses on the Property to others when the easement or other land uses will not interfere unreasonably with the Permitted Use.

### 1.2 Survey and Property Descriptions.

- (a) Tenant prepared Exhibit A, which describes the Property. Tenant warrants that Exhibit A is a true and accurate description of the Lease boundaries and the improvements to be constructed or already existing in the Lease area. Tenant's obligation to provide a true and accurate description of the Property boundaries is a material term of this Lease.
- (b) State's acceptance of Exhibit A does not constitute agreement that Tenant's property description accurately reflects the actual amount of land used by Tenant. State reserves the right to retroactively adjust rent if at any time during the term of the Lease State discovers a discrepancy between Tenant's property description and the area actually used by Tenant.

**1.3 Inspection.** State makes no representation regarding the condition of the Property, improvements located on the Property, the suitability of the Property for Tenant's Permitted Use, compliance with governmental laws and regulations, availability of utility rights, access to the Property, or the existence of hazardous substances on the Property. Tenant inspected the Property and accepts it "AS IS."

## SECTION 2 USE

**2.1 Permitted Use.** Tenant shall use the Property for: Private recreational dock, floating breakwater, and a corner of a concrete boat ramp (the "Permitted Use"), and for no other purpose. This is a water-dependent use. Exhibit B describes the Permitted Use in detail. The Permitted Use is subject to additional obligations in Exhibit B.



**2.2 Restrictions on Permitted Use and Operations.** The following limitations apply to the Property and adjacent state-owned aquatic land. Tenant's compliance with the following does not limit Tenant's liability under any other provision of this Lease.

- (a) Tenant shall not cause or permit:
  - (1) Damage to natural resources,
  - (2) Waste, or
  - (3) Deposit of material, unless approved by State in writing. This prohibition includes deposit of fill, rock, earth, ballast, wood waste, refuse, garbage, waste matter, pollutants of any type, or other matter.
- (b) Tenant shall not cause or permit scour or damage to aquatic land and vegetation. This prohibition includes the following limitations:
  - (1) Tenant shall not use or allow use of a pressure washer to clean underwater surfaces unless the water is deeper than seven (7) feet at the time.
  - (2) Tenant shall not allow moorage or anchorage of vessels in water more shallow than seven (7) feet at the extreme low tide or water.
  - (3) If anchoring, Tenant shall use and shall require use of anchor lines with midline floats.
- (c) Tenant shall not construct new bulkheads or place hard bank armoring.
- (d) Tenant shall not install fixed breakwaters.
- (e) Unless approved by State in writing, Tenant shall not cause or permit dredging on the Property. State will not approve dredging unless (1) required for flood control, maintenance of existing vessel traffic lanes, or maintenance of water intakes and (2) consistent with State's management plans, if any. Tenant shall maintain authorized dredge basins in a manner that prevents internal deeper pockets.

**2.3 Conformance with Laws.** Tenant shall, at all times, keep current and comply with all conditions and terms of permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding Tenant's use or occupancy of the Property.

**2.4 Liens and Encumbrances.** Unless expressly authorized by State in writing, Tenant shall keep the Property free and clear of liens or encumbrances arising from the Permitted Use or Tenant's occupancy of the Property.

### SECTION 3 TERM

**3.1 Term Defined.** The term of this Lease is Twelve (12) years (the "Term"), beginning on the 1<sup>st</sup> day of July, 2012 (the "Commencement Date"), and ending on the 30<sup>th</sup> day of June, 2024 (the "Termination Date"), unless terminated sooner under the terms of this Lease.

**3.2 Renewal of the Lease.** This Lease does not provide a right of renewal. Tenant may apply for a new lease, which State has discretion to grant. Tenant must apply for a new lease at least one (1) year prior to Termination Date. State will notify Tenant within ninety (90) days of its intent to approve or deny a new Lease.



### 3.3 End of Term.

- (a) Upon the expiration or termination of this Lease, Tenant shall remove Improvements in accordance with Section 7, Improvements, and surrender the Property to State in the same or better condition as on the Commencement Date, reasonable wear and tear excepted.
- (b) Definition of Reasonable Wear and Tear.
  - (1) Reasonable wear and tear is deterioration resulting from the Permitted Use that has occurred without neglect, negligence, carelessness, accident, or abuse of the Property by Tenant or any other person on the premises with the permission of Tenant.
  - (2) Reasonable wear and tear does not include unauthorized deposit of material prohibited under Paragraph 2.2 regardless of whether the deposit is incidental to or the byproduct of the Permitted Use.
- (c) If Property is in worse condition, excepting for reasonable wear and tear, on the surrender date than on the Commencement Date, the following provisions apply.
  - (1) State shall provide Tenant a reasonable time to take all steps necessary to remedy the condition of the Property. State may require Tenant to enter into a right-of-entry or other use authorization prior to the Tenant entering the Property if the Lease has terminated.
  - (2) If Tenant fails to remedy the condition of the Property in a timely manner, State may take steps reasonably necessary to remedy Tenant's failure. Upon demand by State, Tenant shall pay all costs of State's remedy, including but not limited to the costs of removing and disposing of material deposited improperly on the Property, lost revenue resulting from the condition of the Property, and administrative costs associated with the State's remedy.

### 3.4 Holdover.

- (a) If Tenant remains in possession of the Property after the Termination Date, the occupancy will not be an extension or renewal of the Term. The occupancy will be a month-to-month tenancy, on terms identical to the terms of this Lease, which either Party may terminate on thirty (30) days' written notice.
  - (1) The monthly rent during the holdover will be the same rent that would be due if the Lease were still in effect and all adjustments in rent were made in accordance with its terms.
  - (2) Payment of more than the monthly rent will not be construed to create a periodic tenancy longer than month-to-month. If Tenant pays more than the monthly rent and State provides notice to vacate the property, State shall refund the amount of excess payment remaining after the Tenant ceases occupation of the Property.
- (b) If State notifies Tenant to vacate the Property and Tenant fails to do so within the time set forth in the notice, Tenant will be a trespasser and shall owe the State all amounts due under RCW 79.02.300 or other applicable law.



## SECTION 4 RENT

### 4.1 Annual Rent.

Until adjusted as set forth below, Tenant shall pay to State an annual rent consisting of One Thousand Five Hundred Forty Dollars and 68/100 (\$1,540.68) related to the water-dependent use. The annual rent, as it currently exists or as adjusted or modified (the "Annual Rent"), is due and payable in full on or before the Commencement Date and on or before the same date of each year thereafter. Any payment not paid by State's close of business on the date due is past due.

**4.2 Payment Place.** Tenant shall make payment to Financial Management Division, 1111 Washington St SE, PO Box 47041, Olympia, WA 98504-7041.

**4.3 Adjustment Based on Use.** Annual Rent is based on Tenant's Permitted Use of the Property, as described in Section 2 above. If Tenant's Permitted Use changes, the Annual Rent shall be adjusted as appropriate for the changed use.

### 4.4 Rent Adjustment Procedures.

- (a) Notice of Rent Adjustment. State shall provide notice of adjustments to the Annual Rent allowed under Paragraphs 4.5(b) to Tenant in writing no later than ninety (90) days after the anniversary date of the Lease.
- (b) Procedures on Failure to make Timely Adjustment. If the State fails to provide the notice required in Paragraph 4.4(a), State shall not collect the adjustment amount for the year in which State failed to provide notice. Upon providing notice of adjustment, State may adjust and prospectively bill Annual Rent as if missed or waived adjustments had been implemented at the proper interval. This includes the implementation of any inflation adjustment.

### 4.5 Rent Adjustments for Water-Dependent Uses.

- (a) Inflation Adjustment. State shall adjust water-dependent rent annually pursuant to RCW 79.105.200-.360, except in those years in which State revalues the rent under Paragraph 4.5(b) below. This adjustment will be effective on the anniversary of the Commencement Date.
- (b) Revaluation of Rent. At the end of the first four-year period of the Term, and at the end of each subsequent four-year period, State shall revalue the water-dependent Annual Rent in accordance with RCW 79.105.200-.360.
- (c) Rent Cap. State shall increase rent incrementally in compliance with RCW 79.105.260 as follows: If application of the statutory rent formula for water-dependent uses would result in an increase in the rent attributable to such uses of more than fifty percent (50%) in any one year, State shall limit the actual increase implemented in such year to fifty percent (50%) of the then-existing rent. In subsequent, successive years, State shall increase the rental amount incrementally until the State implements the full amount of increase as determined by the statutory rent formula.



## SECTION 5 OTHER EXPENSES

**5.1 Utilities.** Tenant shall pay all fees charged for utilities required or needed by the Permitted Use.

**5.2 Taxes and Assessments.** Tenant shall pay all taxes (including leasehold excise taxes), assessments, and other governmental charges applicable or attributable to the Property, Tenant's leasehold interest, the improvements, or Tenant's use and enjoyment of the Property.

**5.3 Right to Contest.** If in good faith, Tenant may contest any tax or assessment at its sole cost and expense. At the request of State, Tenant shall furnish reasonable protection in the form of a bond or other security, satisfactory to State, against loss or liability resulting from such contest.

**5.4 Proof of Payment.** If required by State, Tenant shall furnish to State receipts or other appropriate evidence establishing the payment of amounts this Lease requires Tenant to pay.

**5.5 Failure to Pay.** If Tenant fails to pay amounts due under this Lease, State may pay the amount due, and recover its cost in accordance with Section 6.

## SECTION 6 LATE PAYMENTS AND OTHER CHARGES

**6.1 Failure to Pay Rent.** Failure to pay rent is a default by the Tenant. State may seek remedies under Section 14 as well as late charges and interest as provided in this Section 6.

**6.2 Late Charge.** If State does not receive full rent payment within ten (10) days of the date due, Tenant shall pay to State a late charge equal to four percent (4%) of the unpaid amount or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State incident to the delay.

**6.3 Interest Penalty for Past Due Rent and Other Sums Owed.**

- (a) Tenant shall pay interest on the past due rent at the rate of one percent (1%) per month until paid, in addition to paying the late charges determined under Paragraph 6.2. Rent not paid by the close of business on the due date will begin accruing interest the day after the due date.
- (b) If State pays or advances any amounts for or on behalf of Tenant, Tenant shall reimburse State for the amount paid or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Tenant of the payment or advance. This includes, but is not limited to, State's payment of taxes of any kind, assessments, insurance premiums, costs of removal and disposal of materials or Improvements under any provision of this Lease, or other amounts not paid when due.

**6.4 Referral to Collection Agency and Collection Agency Fees.** If State does not receive full payment within thirty (30) days of the due date, State may refer the unpaid amount to a  
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collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral, Tenant shall pay collection agency fees in addition to the unpaid amount.

**6.5 No Accord and Satisfaction.** If Tenant pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. State may accept payment in any amount without prejudice to State's right to recover the balance of the rent or pursue any other right or remedy. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment constitutes accord and satisfaction.

**6.6 No Counterclaim, Setoff, or Abatement of Rent.** Except as expressly set forth elsewhere in this Lease, Tenant shall pay rent and all other sums payable by Tenant without the requirement that State provide prior notice or demand. Tenant's payment is not subject to counterclaim, setoff, deduction, defense or abatement.

## SECTION 7 IMPROVEMENTS

### 7.1 Improvements Defined.

- (a) "Improvements," consistent with RCW 79.105 through 79.145, are additions within, upon, or attached to the land. This includes, but is not limited to, fill, structures, bulkheads, docks, pilings, and other fixtures.
- (b) "Personal Property" means items that can be removed from the Property without (1) injury to the Property or Improvements or (2) diminishing the value or utility of the Property or Improvements.
- (c) "State-Owned Improvements" are Improvements made or owned by State. State-Owned Improvements includes any construction, alteration, or addition to State-Owned Improvements made by Tenant.
- (d) "Tenant-Owned Improvements" are Improvements authorized by State and (1) made by Tenant or (2) acquired by Tenant from the prior tenant.
- (e) "Unauthorized Improvements" are Improvements made on the Property without State's prior consent or Improvements made by Tenant that do not conform to plans submitted to and approved by the State.

**7.2 Existing Improvements.** On the Commencement Date, the following Improvements are located on the Property: Private recreational dock, floating breakwater, and a corner of a concrete boat ramp. The Improvements are Tenant-Owned.

### 7.3 Construction, Major Repair, Modification, and Demolition.

- (a) This Paragraph 7.3 governs construction, alteration, replacement, major repair, modification, demolition, and deconstruction of Improvements ("Work"). Section 11 governs routine maintenance and minor repair.
- (b) All Work must conform to requirements under Paragraph 7.4. Paragraph 11.3, which applies to routine maintenance and minor repair, also applies to all Work under this Paragraph 7.3.
- (c) Except in an emergency, Tenant shall not conduct Work, without State's prior written consent, as follows:



- (1) State may deny consent if State determines that denial is in the best interests of the State or if proposed Work does not comply with Paragraphs 7.4 and 11.3. State may impose additional conditions reasonably intended to protect and preserve the Property. If Work is for removal of Improvements at End of Term, State may waive removal of some or all Improvements.
- (2) Except in an emergency, Tenant shall submit to State plans and specifications describing the proposed Work at least sixty (60) days before submitting permit applications to regulatory authorities unless Tenant and State otherwise agree to coordinate permit applications. At a minimum, or if no permits are necessary, Tenant shall submit plans and specifications at least ninety (90) days before commencement of Work.
- (3) State waives the requirement for consent if State does not notify Tenant of its grant or denial of consent within sixty (60) days of submittal.
- (d) Tenant shall notify State of emergency Work within five (5) business days of the start of such Work. Upon State's request, Tenant shall provide State with plans and specifications or as-builts of emergency Work.
- (e) Tenant shall not commence or authorize Work until Tenant has:
- (1) Obtained a performance and payment bond in an amount equal to one hundred twenty-five percent (125%) -OR- other percent of the estimated cost of construction. Tenant shall maintain the performance and payment bond until Tenant pays in full the costs of the Work, including all laborers and material persons.
- (2) Obtained all required permits.
- (f) Before completing Work, Tenant shall remove all debris and restore the Property to an orderly and safe condition. If Work is intended for removal of Improvements at End of Term, Tenant shall restore the Property in accordance with Paragraph 3.3, End of Term.
- (g) Upon completing work, Tenant shall promptly provide State with as-built plans and specifications.
- (h) State shall not charge rent for authorized Improvements installed by Tenant during this Term of this Lease, but State may charge rent for such Improvements when and if Tenant or successor obtains a subsequent use authorization for the Property and State has waived the requirement for Improvements to be removed as provided in Paragraph 7.5.

#### **7.4 Standards for Work.**

- (a) Applicability of Standards for Work
- (1) The standards for Work in Paragraph 7.4(b) apply to Work commenced in the five year period following the Commencement Date. Work has commenced if State has approved plans and specifications.
- (2) If Tenant undertakes Work five years or more after the Commencement Date, Tenant shall comply with State's then current standards for Work.
- (3) At Tenant's option, Tenant may ascertain State's current standards for Work as follows:





- UNOFFICIAL
- (i) Before submitting plans and specifications for State's approval as required by Paragraph 7.3 of the Lease, Tenant shall request State to provide Tenant with then current standards for Work on State-owned Aquatic Lands.
  - (ii) Within thirty (30) days of receiving Tenant's request, State shall provide Tenant with current standards for Work, which will be effective for the purpose of State's approval of Tenant's proposed Work provided Tenant submits plans and specifications for State's approval within two (2) years of Tenant's request for standards.
  - (iii) If State does not timely provide current standards upon Tenant's request, the standards under Paragraph 7.4(b) apply to Tenant's Work provided Tenant submits plans and specifications as required by Paragraph 7.3 within two (2) years of Tenant's request for standards.
  - (iv) If Tenant fails to (1) make a request for current standards or (2) timely submit plans and specifications to State after receiving current standards, Tenant shall make changes in plans or Work necessary to conform to current standards for Work upon State's demand.
- (b) Standards for Work
- (1) Tenant shall not conduct in-water Work during time periods prohibited for such work under WAC 220-110-271, Prohibited Work Times in Saltwater, as amended, or as otherwise directed by the Washington Department of Fish and Wildlife (WDFW).
  - (2) Tenant shall not provide anchorage or moorage in water more shallow than seven (7) feet (2 meters) at the extreme low tide or water.
  - (3) Tenant shall site new or expanded Improvements to avoid impacts to native Aquatic Vegetation Species using the methods described in Washington DNR Technical Memorandum.

## 7.5 Tenant-Owned Improvements at End of Lease.

- (a) Disposition
- (1) Tenant shall remove Tenant-Owned Improvements in accordance with Paragraph 7.3 upon the expiration, termination, or cancellation of the Lease unless State waives the requirement for removal.
  - (2) Tenant-Owned Improvements remaining on the Property on the expiration, termination or cancellation date shall become State-Owned Improvements without payment by State, unless State elects otherwise. State may refuse or waive ownership. If RCW 79.125.300 or 79.130.040 apply at the time this Lease expires, Tenant could be entitled to payment by the new tenant for Tenant-Owned Improvements.
  - (3) If Tenant-Owned Improvements remain on the Property after the expiration, termination, or cancellation date without State's consent, State may remove all Improvements and Tenant shall pay State's costs.
- (b) Conditions Under Which State May Waive Removal of Tenant-Owned Improvement



- (1) State may waive removal of some or all Tenant-Owned Improvements whenever State determines that it is in the best interests of the State and regardless of whether Tenant re-leases the Property.
  - (2) If Tenant re-leases the Property, State may waive requirement to remove Tenant-Owned Improvements. State also may consent to Tenant's continued ownership of Tenant-Owned Improvements.
  - (3) If Tenant does not re-lease the Property, State may waive requirement to remove Tenant-Owned Improvements upon consideration of a timely request from Tenant, as follows:
    - (i) Tenant must notify State at least one (1) year before the Termination Date of its request to leave Tenant-Owned Improvements.
    - (ii) State, within ninety (90) days of receiving Tenant's notification, will notify Tenant whether State consents to some or all Tenant-Owned Improvements remaining. State has no obligation to grant consent.
    - (iii) State's failure to respond to Tenant's request to leave Improvements within ninety (90) days is a denial of the request.
- (c) Tenant's Obligations if State Waives Removal.
- (1) Tenant shall not remove Improvements if State waives the requirement for removal of some or all Tenant-Owned Improvements.
  - (2) Tenant shall maintain such Improvements in accordance with this Lease until the expiration, termination, or cancellation date. Tenant is liable to State for cost of repair if Tenant causes or allows damage to Improvements State has designated to remain.

#### **7.6 Disposition of Unauthorized Improvements.**

- (a) Unauthorized Improvements belong to State, unless State elects otherwise.
- (b) State may either:
  - (1) Consent to Tenant ownership of the Improvements, or
  - (2) Charge rent for use of the Improvements from the time of installation or construction and
    - (i) Require Tenant to remove the Improvements in accordance with Paragraph 7.3, in which case Tenant shall pay rent for the Improvements until removal, or
    - (ii) Consent to Improvements remaining and Tenant shall pay rent for the use of the Improvements, or
    - (iii) Remove Improvements and Tenant shall pay for the cost of removal and disposal, in which case Tenant shall pay rent for use of the Improvements until removal and disposal.

#### **7.7 Disposition of Personal Property.**

- (a) Tenant retains ownership of Personal Property unless Tenant and State agree otherwise in writing.



- (b) Tenant shall remove Personal Property from the Property by the Termination Date. Tenant is liable for damage to the Property and Improvements resulting from removal of Personal Property.
- (c) State may sell or dispose of all Personal Property left on the Property after the Termination Date.
  - (1) If State conducts a sale of Personal Property, State shall apply proceeds first to the State's administrative costs in conducting the sale, second to payment of amount that then may be due from the Tenant to the State. State shall pay the remainder, if any, to the Tenant.
  - (2) If State disposes of Personal Property, Tenant shall pay for the cost of removal and disposal.

## SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION

### 8.1 Definitions.

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup.
- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any law described in Paragraph 8.1(a).
- (c) "Utmost care" means such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances; the standard of care applicable under the Washington State Model Toxics Control Act ("MTCA"), Chapter 70.105 RCW, as amended.
- (d) "Tenant and affiliates" when used in this Section 8 means Tenant or Tenant's subtenants, contractors, agents, employees, guests, invitees, licensees, affiliates, or any person on the Property with the Tenant's permission.
- (e) "Liabilities" as used in this Section 8 means any claims, demands, proceedings, lawsuits, damages, costs, expenses, fees (including attorneys' fees and disbursements), penalties, or judgments.

### 8.2 General Conditions.

- (a) Tenant's obligations under this Section 8 extend to the area in, on, under, or above
  - (1) The Property and
  - (2) Adjacent state-owned aquatic lands if affected by a release of Hazardous Substances that occurs as a result of the Permitted Use.
- (b) Standard of Care.
  - (1) Tenant shall exercise the utmost care with respect to Hazardous Substances.
  - (2) Tenant shall exercise utmost care for the foreseeable acts or omissions of third parties with respect to Hazardous Substances, and the foreseeable consequences of those acts or omissions, to the extent required to establish a viable, third-party defense under the law.



**8.3 Current Conditions and Duty to Investigate.**

- (a) State makes no representation about the condition of the Property. Hazardous Substances may exist in, on, under, or above the Property.
- (b) This Lease does not impose a duty on State to conduct investigations or supply information to Tenant about Hazardous Substances.
- (c) Tenant is responsible for conducting all appropriate inquiry and gathering sufficient information about the existence, scope, and location of Hazardous Substances on or near the Property necessary for Tenant to meet Tenant's obligations under this Lease and utilize the Property for the Permitted Use.

**8.4 Use of Hazardous Substances.**

- (a) Tenant and affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws.
- (b) Tenant shall not undertake, or allow others to undertake by Tenant's permission, acquiescence, or failure to act, activities that result in a release or threatened release of Hazardous Substances.
- (c) If use of Hazardous Substances related to Tenant's use or occupancy of the Property results in violation of law:
  - (1) Tenant shall submit to State any plans for remedying the violations, and
  - (2) Tenant shall implement any remedial measures to restore the Property or natural resources that State may require in addition to remedial measures required by regulatory authorities.
- (d) At a minimum, Tenant and affiliates shall observe the following Hazardous Substances operational standards. If the Washington Department of Ecology, U.S. Environmental Protection Agency or other regulatory agency establishes different standards applicable to Tenant's activities under the Permitted Use, Tenant shall meet the standard that provides greater protection to the environment.
  - (1) Tenant shall not allow work on overwater structures or vessels without protective measures to prevent discharge of toxins to the water, including:
    - (i) Tenant shall not cause or allow underwater hull scraping and other underwater removal of paints.
    - (ii) Tenant shall not cause or allow underwater refinishing work from boats or temporary floats unless permitted by an industrial National Pollution Discharge Elimination System (NPDES) permit.
    - (iii) Tenant shall not cause or allow above the waterline boat repairs or refinishing in-water except if limited to decks and superstructures and less than 25 percent of a boat is repaired or refinished in-water per year.
    - (iv) Tenant shall use and require others to use tarps and other dust, drip and spill containment measures when repairing or refinishing boats in water.
  - (2) Tenant shall not store or allow others to store fuel tanks, petroleum products, hydraulic fluid, machinery coolants, lubricants and chemicals not in use in locations above the water surface.



- (3) Tenant shall inspect all equipment using petroleum products, hydraulic fluids, machinery coolants, chemicals, or other toxic or deleterious materials on a monthly basis and immediately make all repairs necessary to stop leakage. Tenant shall submit to State an annual report documenting inspections and repair.
- (4) Tenant shall maintain a supply of oil spill containment materials adequate to contain a spill from the largest vessel in use on the Property.
- (5) Tenant shall not use or allow use of a pressure washer at any location above the water surface to clean any item that uses petroleum products.

**8.5 Management of Contamination, if any.**

- (a) Tenant and affiliates shall not undertake activities that:
  - (1) Damage or interfere with the operation of remedial or restoration activities, if any;
  - (2) Result in human or environmental exposure to contaminated sediments, if any;
  - (3) Result in the mechanical or chemical disturbance of on-site habitat mitigation, if any.
- (b) If requested, Tenant shall allow reasonable access to:
  - (1) Employees and authorized agents of the Environmental Protection Agency, the Washington State Department of Ecology, health department, or other similar environmental agencies; and
  - (2) Potentially liable or responsible parties who are the subject of an order or consent decree that requires access to the Property. Tenant may negotiate an access agreement with such parties, but Tenant may not unreasonably withhold such agreement.

**8.6 Notification and Reporting.**

- (a) Tenant shall immediately notify State if Tenant becomes aware of any of the following:
  - (1) A release or threatened release of Hazardous Substances;
  - (2) Any new discovery of or new information about a problem or liability related to, or derived from, the presence of Hazardous Substances;
  - (3) Any lien or action arising from Hazardous Substances;
  - (4) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances;
  - (5) Any notification from the US Environmental Protection Agency (EPA) or the Washington State Department of Ecology (DOE) that remediation or removal of Hazardous Substances is or may be required at the Property.
- (b) Tenant's duty to report under Paragraph 8.6(a) extends to lands described in Paragraph 8.2(a) and to any other property used by Tenant in conjunction with the Property if a release of Hazardous Substances on the other property could affect the Property.
- (c) Tenant shall provide State with copies of all documents Tenant submits to any federal, state or local authorities concerning environmental impacts or proposals



relative to the Property. Documents subject to this requirement include, but are not limited to, applications, reports, studies, or audits for National Pollution Discharge and Elimination System Permits; Army Corps of Engineers permits; State Hydraulic Project Approvals (HPA); State Water Quality certification; Substantial Development permit; and any reporting necessary for the existence, location, and storage of Hazardous Substances on the Property.

#### **8.7 Indemnification.**

- (a) Tenant shall fully indemnify, defend, and hold State harmless from and against Liabilities that arise out of, or relate to:
  - (1) The use, storage, generation, processing, transportation, handling, or disposal of any Hazardous Substance by Tenant and affiliates occurring whenever Tenant occupies or has occupied the Property;
  - (2) The release or threatened release of any Hazardous Substance resulting from any act or omission of Tenant and affiliates occurring whenever Tenant occupies or has occupied the Property.
- (b) Tenant shall fully indemnify, defend, and hold State harmless for Liabilities that arise out of or relate to Tenant's breach of obligations under Paragraph 8.5.
- (c) Tenant has no duty to indemnify State for acts or omissions of third parties unless and only if an administrative or legal proceeding arising from a release or threatened release of Hazardous Substances finds or holds that Tenant failed to exercise care as described in Paragraph 8.2(b)(2). In such case, Tenant shall fully indemnify, defend, and hold State harmless from and against Liabilities arising from the acts or omissions of third parties in relation to the release or threatened release of Hazardous Substances. This includes Liabilities arising before the finding or holding in the proceeding.

#### **8.8 Reservation of Rights.**

- (a) For Liabilities not covered by the indemnification provisions of Paragraph 8.7, the Parties expressly reserve and do not waive any rights, claims, immunities, causes of action, or defenses relating to Hazardous Substances that either Party may have against the other under law.
- (b) The Parties expressly reserve all rights, claims, immunities, and defenses either Party may have against third parties. Nothing in this Section 8 benefits or creates rights for third parties.
- (c) The allocations of risks, Liabilities, and responsibilities set forth in this Section 8 do not release either Party from or affect the liability of either Party for Hazardous Substances claims or actions by regulatory agencies.

#### **8.9 Cleanup.**

- (a) If Tenant's act, omission, or breach of obligation under Paragraph 8.4 results in a release of Hazardous Substances that exceeds the threshold limits of any applicable regulatory standard, Tenant shall, at Tenant's sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substances in accordance with applicable law.



- (b) Tenant may undertake a cleanup of the Property pursuant to the Washington State Department of Ecology's Voluntary Cleanup Program, provided that Tenant cooperates with the Department of Natural Resources in development of cleanup plans. Tenant shall not proceed with Voluntary Cleanup without the Department of Natural Resources approval of final plans. Nothing in the operation of this provision is an agreement by the Department of Natural Resources that the Voluntary Cleanup complies with any laws or with the provisions of this Lease. Tenant's completion of a Voluntary Cleanup is not a release from or waiver of any obligation for Hazardous Substances under this Lease.

**8.10 Sampling by State, Reimbursement, and Split Samples.**

- (a) State may enter the Property and conduct sampling, tests, audits, surveys, or investigations ("Tests") of the Property at any time to determine the existence, scope, or effects of Hazardous Substances.
- (b) If such Tests, along with any other information, demonstrate a breach of Tenant's obligations regarding Hazardous Substances under this Lease, Tenant shall promptly reimburse State for all costs associated with the Tests, provided State gave Tenant thirty (30) calendar days advance notice in nonemergencies and reasonably practical notice in emergencies.
- (c) In nonemergencies, Tenant is entitled to obtain split samples of Test samples, provided Tenant gives State written notice requesting split samples at least ten (10) calendar days before State conducts Tests. Upon demand, Tenant shall promptly reimburse State for additional cost, if any, of split samples.
- (d) If either Party conducts Tests on the Property, the conducting Party shall provide the other with validated final data and quality assurance/quality control/chain of custody information about the Tests within sixty (60) calendar days of a written request by the other party, unless Tests are part of a submittal under Paragraph 8.6(c) in which case Tenant shall submit data and information to State without written request by State. Neither party is obligated to provide any analytical summaries or the work product of experts.

**SECTION 9 ASSIGNMENT AND SUBLETTING**

**9.1 State Consent Required.** Tenant shall not convey, transfer, or encumber any part of Tenant's interest in this Lease or the Property without State's prior written consent, which State shall not unreasonably condition or withhold.

- (a) In determining whether to consent, State may consider, among other items, the proposed transferee's financial condition, business reputation and experience, the nature of the proposed transferee's business, the then-current value of the Property, and such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the Property. State may refuse its consent to any conveyance, transfer, or encumbrance if it will result in a subdivision of the leasehold. Tenant shall submit information regarding any proposed transferee to State at least thirty (30) days prior to the date of the proposed transfer.
- (b) State reserves the right to condition its consent upon:

Aquatic Lands Lease

Lease No. 20-A11236



201205150052  
Skagit County Auditor

- (1) changes in the terms and conditions of this Lease, including, but not limited to, the Annual Rent; and/or
  - (2) the agreement of Tenant or transferee to conduct Tests for Hazardous Substances on the Property or on other property owned or occupied by Tenant or the transferee.
- (c) Each permitted transferee shall assume all obligations under this Lease, including the payment of rent. No assignment, sublet, or transfer shall release, discharge, or otherwise affect the liability of Tenant.
- (d) State's consent under this Paragraph 9.1 does not constitute a waiver of any claims against Tenant for the violation of any term of this Lease.

**9.2 Rent Payments Following Assignment.** The acceptance by State of the payment of rent following an assignment or other transfer does not constitute consent to any assignment or transfer.

**9.3 Terms of Subleases.**

- (a) Tenant shall submit the terms of all subleases to State for approval.
- (b) Tenant shall incorporate the following requirements in all subleases:
  - (1) The sublease must be consistent with and subject to all the terms and conditions of this Lease;
  - (2) The sublease must provide that this Lease controls if the terms of the sublease conflict with the terms of this Lease;
  - (3) The term of the sublease (including any period of time covered by a renewal option) must end before the Termination Date of the initial Term or any renewal term;
  - (4) The sublease must terminate if this Lease terminates for any reason;
  - (5) The subtenant must receive and acknowledge receipt of a copy of this Lease;
  - (6) The sublease must prohibit the prepayment to Tenant by the subtenant of more than the annual rent;
  - (7) The sublease must identify the rental amount subtenant is to pay to Tenant;
  - (8) The sublease must provide that there is no privity of contract between the subtenant and State;
  - (9) The sublease must require removal of the subtenant's Improvements and Personal Property upon termination of the sublease;
  - (10) The subtenant's permitted use must be within the scope of the Permitted Use; and
  - (11) The sublease must require the subtenant to meet all obligations of Tenant under Section 10, Indemnification, Financial Security, and Insurance.

**9.4 Short-Term Subleases of Moorage Slips.** Short-term subleasing of moorage slips for a term of less than one year does not require State's written consent or approval pursuant to Paragraphs 9.1 or 9.3. Tenant shall conform moorage sublease agreements to the sublease requirements in Paragraph 9.3.





## SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE

### 10.1 Indemnity.

- (a) Tenant shall indemnify, defend, and hold State, its employees, officers, and agents harmless from Claims arising out of the use, occupation, or control of the Property by Tenant, its subtenants, contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees.
- (b) "Claim" as used in this Paragraph 10.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys' fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. "Damages to tangible property" includes, but is not limited to, physical injury to the Property and damages resulting from loss of use of the Property.
- (c) State shall not require Tenant to indemnify, defend, and hold State harmless for claims that arise solely out of the willful or negligent act of State or State's elected officials, employees, or agents.
- (d) Tenant waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless.
- (e) Section 8, Environmental Liability/Risk Allocation, exclusively shall govern Tenant's liability to State for Hazardous Substances and its obligation to indemnify, defend, and hold State harmless for Hazardous Substances.

### 10.2 Insurance Terms.

- (a) Insurance Required.
  - (1) At its own expense, Tenant shall procure and maintain during the Term of this Lease, the insurance coverages and limits described in this Paragraph 10.2 and in Paragraph 10.3, Insurance Types and Limits. State may terminate this Lease if Tenant fails to maintain required insurance.
  - (2) Unless State agrees to an exception, Tenant shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Tenant may submit a request to the risk manager for the Department of Natural Resources to approve an exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies shall comply with Chapter 48.15 RCW and 284-15 WAC.
  - (3) All general liability, excess, umbrella, property, builder's risk, and pollution legal liability insurance policies must name the State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees as an additional insured.
  - (4) All insurance provided in compliance with this Lease must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.



(b) Waiver.

- (1) Tenant waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Lease covers these damages.
- (2) Except as prohibited by law, Tenant waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this lease.

(c) Proof of Insurance.

- (1) Tenant shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this Lease and, if requested, copies of policies to State.
- (2) The certificate(s) of insurance must reference additional insureds and the Lease number.
- (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.

(d) State must receive written notice before cancellation or non-renewal of any insurance required by this Lease, as follows:

- (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.
- (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.

(e) Adjustments in Insurance Coverage.

- (1) State may impose changes in the limits of liability for all types of insurance as State deems necessary.
- (2) Tenant shall secure new or modified insurance coverage within thirty (30) days after State requires changes in the limits of liability.

(f) If Tenant fails to procure and maintain the insurance described above within fifteen (15) days after Tenant receives a notice to comply from State, State may either:

- (1) Deem the failure an Event of Default under Section 14, or
- (2) Procure and maintain comparable substitute insurance and pay the premiums. Upon demand, Tenant shall pay to State the full amount paid by State, together with interest at the rate provided in Paragraph 6.2 from the date of State's notice of the expenditure until Tenant's repayment.

(g) General Terms.

- (1) State does not represent that coverage and limits required under this Lease are adequate to protect Tenant.
- (2) Coverage and limits do not limit Tenant's liability for indemnification and reimbursements granted to State under this Lease.
- (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to property first to restore the real property covered by this



Lease, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Tenant.

**10.3 Insurance Types and Limits.**

- (a) General Liability Insurance.
- (1) Tenant shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Property and/or arising out of Tenant's use, occupation, or control of the Property and, if necessary, commercial umbrella insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit must be at least twice the "each occurrence" limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the "each occurrence" limit.
  - (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance must cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract) and contain separation of insured (cross-liability) condition.
  - (3) MGL insurance must have no exclusions for non-owned watercraft.
- (b) Workers' Compensation.
- (1) State of Washington Workers' Compensation.
    - (i) Tenant shall comply with all State of Washington workers' compensation statutes and regulations. Tenant shall provide workers' compensation coverage for all employees of Tenant. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with Tenant's use, occupation, and control of the Property.
    - (ii) If Tenant fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Tenant shall indemnify State. Indemnity shall include all fines; payment of benefits to Tenant, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
  - (2) Longshore and Harbor Workers' and Jones Acts. Longshore and Harbor Workers' Act (33 U.S.C. Section 901 *et seq.*) and/or the Jones Act (46 U.S.C. Section 688) may require Tenant to provide insurance coverage in some circumstances. Tenant shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with law. Tenant is responsible for all civil and criminal liability arising from failure to maintain such coverage.



(c) Employers' Liability Insurance. Tenant shall procure employers' liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.

(d) Property Insurance.

- (1) Tenant shall buy and maintain property insurance covering all real property and fixtures, equipment, tenant improvements and betterments (regardless of whether owned by Tenant or State). Such insurance must be written on an all risks basis and, at minimum, cover the perils insured under ISO Special Causes of Loss Form CP 10 30, and cover the full replacement cost of the property insured. Such insurance may have commercially reasonable deductibles. Any coinsurance requirement in the policy must be waived. The policy must include State as an insured and a loss payee.
- (2) Tenant shall buy and maintain boiler and machinery insurance required by contract documents or by law, covering all real property and fixtures, equipment, tenant improvements and betterments (regardless of whether owned by Tenant or State) from loss or damage caused by the explosion of boilers, fired or unfired vessels, electric or steam generators, or pipes.
- (3) In the event of any loss, damage, or casualty which is covered by one or more of the types of insurance described above, the Parties to this Lease shall proceed cooperatively to settle the loss and collect the proceeds of such insurance, which State shall hold in trust, including interest earned by State on such proceeds, for use according to the terms of this Lease. The Parties shall use insurance proceeds in accordance with Paragraph 10.2(g)(3).
- (4) When sufficient funds are available, using insurance proceeds described above, the Parties shall continue with reasonable diligence to prepare plans and specifications for, and thereafter carry out, all work necessary to:
  - (i) Repair and restore damaged building(s) and/or Improvements to their former condition, or
  - (ii) Replace and restore damaged building(s) and/or Improvements with a new building(s) and/or Improvements on the Property of a quality and usefulness at least equivalent to or more suitable than, damaged building(s) and/or Improvements.

#### 10.4 Financial Security.

- (a) At its own expense, Tenant shall procure and maintain during the Term of this Lease a corporate security bond or provide other financial security that State, at its option, may approve ("Security"). Tenant shall provide Security in an amount equal to Twenty Thousand Dollars (\$20,000), which is consistent with RCW 79.105.330, and secures Tenant's performance of its obligations under this Lease, with the exception of the obligations under Section 8, Environmental



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Liability/Risk Allocation. Tenant's failure to maintain the Security in the required amount during the Term constitutes a breach of this Lease.

- (b) All Security must be in a form acceptable to the State.
- (1) Bonds must be issued by companies admitted to do business within the State of Washington and have a rating of A-, Class VII or better, in the most recently published edition of Best's Reports, unless State approves an exception. Tenant may submit a request to the risk manager for the Department of Natural Resources for an exception to this requirement.
  - (2) Letters of credit, if approved by State, must be irrevocable, allow State to draw funds at will, provide for automatic renewal, and comply with RCW 62A.5-101, *et. seq.*
  - (3) Savings account assignments, if approved by State, must allow State to draw funds at will.
- (c) Adjustment in Amount of Security.
- (1) State may require an adjustment in the Security amount:
    - (i) At the same time as revaluation of the Annual Rent,
    - (ii) As a condition of approval of assignment or sublease of this Lease,
    - (iii) Upon a material change in the condition or disposition of any Improvements, or
    - (iv) Upon a change in the Permitted Use.
  - (2) Tenant shall deliver a new or modified form of Security to State within thirty (30) days after State has required adjustment of the amount of the Security.
- (d) Upon any default by Tenant in its obligations under this Lease, State may collect on the Security to offset the liability of Tenant to State. Collection on the Security does not (1) relieve Tenant of liability, (2) limit any of State's other remedies, (3) reinstate or cure the default or (4) prevent termination of the Lease because of the default.

## SECTION 11 ROUTINE MAINTENANCE AND REPAIR

**11.1 State's Repairs.** This Lease does not obligate State to make any alterations, maintenance, replacements, or repairs in, on, or about the Property, or any part thereof, during the Term.

### 11.2 Tenant's Repairs and Maintenance

- (a) Routine maintenance and repair are acts intended to prevent a decline, lapse or, cessation of the Permitted Use and associated Improvements. Routine maintenance or repair is the type of work that does not require regulatory permits.
- (b) At Tenant's own expense, Tenant shall keep and maintain the Property and all Improvements in good order and repair and in a safe condition. State's consent is not required for routine maintenance or repair.
- (c) At Tenant's own expense, Tenant shall make any additions, repairs, alterations, maintenance, replacements, or changes to the Property or to any Improvements on the Property that any public authority may require. If a public authority requires



work beyond the scope of routine maintenance and repair, Tenant shall comply with Section 7 of this Lease.

**11.3 Limitations.** The following limitations apply whenever Tenant conducts maintenance, repair or replacement. The following limitations also apply whenever Tenant conducts maintenance, repair, or replacement on the exterior surfaces, features, or fixtures of a floating house.

- (a) Tenant shall not use or install treated wood at any location above or below water, except that Tenant may use treated wood for above water structural framing.
- (b) Tenant shall not use or install tires (for example, floatation or fenders) at any location above or below water.
- (c) Tenant shall install only floatation material encapsulated in a shell resistant to ultraviolet radiation and abrasion. The shell must be capable of preventing breakup and loss of floatation material into the water.
- (d) Tenant shall orient night lighting to minimize the amount of light shining directly on the water.

## SECTION 12 DAMAGE OR DESTRUCTION

### 12.1 Notice and Repair.

- (a) In the event of damage to or destruction of the Property or Improvements, Tenant shall promptly give written notice to State. State does not have actual knowledge of the damage or destruction without Tenant's written notice.
- (b) Unless otherwise agreed in writing, Tenant shall promptly reconstruct, repair, or replace the Property and Improvements as nearly as possible to its condition immediately prior to the damage or destruction in accordance with Paragraph 7.3, Construction, Major Repair, Modification, and Demolition and Tenant's additional obligations in Exhibit B, if any.

**12.2 State's Waiver of Claim.** State does not waive any claims for damage or destruction of the Property unless State provides written notice to Tenant of each specific claim waived.

**12.3 Insurance Proceeds.** Tenant's duty to reconstruct, repair, or replace any damage or destruction of the Property or any Improvements on the Property is not conditioned upon the availability of any insurance proceeds to Tenant from which the cost of repairs may be paid. The Parties shall use insurance proceeds in accordance with Paragraph 10.2(g)(3).

**12.4 Rent in the Event of Damage or Destruction.** Unless the Parties agree to terminate this Lease, there is no abatement or reduction in rent during such reconstruction, repair, and replacement.

**12.5 Default at the Time of Damage or Destruction.** If Tenant is in default under the terms of this Lease at the time damage or destruction occurs, State may elect to terminate the Lease and State then shall have the right to retain any insurance proceeds payable as a result of the damage or destruction.



## SECTION 13 CONDEMNATION

### 13.1 Definitions.

- (a) "Taking" means that an entity authorized by law exercises the power of eminent domain, either by judgment, settlement in lieu of judgment, or voluntary conveyance in lieu of formal court proceedings, over all or any portion of the Property and Improvements. This includes any exercise of eminent domain on any portion of the Property and Improvements that, in the judgment of the State, prevents or renders impractical the Permitted Use.
- (b) "Date of Taking" means the date upon which title to the Property or a portion of the Property passes to and vests in the condemner or the effective date of any order for possession if issued prior to the date title vests in the condemner.

**13.2 Effect of Taking.** If there is a taking, the Lease terminates proportionate to the extent of the taking. If this Lease terminates in whole or in part, Tenant shall make all payments due and attributable to the taken Property up to the date of taking. If Tenant has pre-paid rent and Tenant is not in default of the Lease, State shall refund Tenant the pro rata share of the pre-paid rent attributable to the period after the date of taking.

### 13.3 Allocation of Award.

- (a) The Parties shall allocate the condemnation award based upon the ratio of the fair market value of (1) Tenant's leasehold estate and Tenant-Owned Improvements and (2) State's interest in the Property; the reversionary interest in Tenant-Owned Improvements, if any; and State-Owned Improvements, if any.
- (b) If Tenant and State are unable to agree on the allocation, the Parties shall submit the dispute to binding arbitration in accordance with the rules of the American Arbitration Association.

## SECTION 14 DEFAULT AND REMEDIES

**14.1 Default Defined.** Tenant is in default of this Lease on the occurrence of any of the following:

- (a) Failure to pay rent or other expenses when due;
- (b) Failure to comply with any law, regulation, policy, or order of any lawful governmental authority;
- (c) Failure to comply with any other provision of this Lease;
- (d) Commencement of bankruptcy proceedings by or against Tenant or the appointment of a trustee or receiver of Tenant's property.

### 14.2 Tenant's Right to Cure.

- (a) A default becomes an "Event of Default" if Tenant fails to cure the default within the applicable cure period following State's written notice of default. Upon an Event of Default, State may seek remedies under Paragraph 14.3.



- (b) Unless expressly provided elsewhere in this Lease, the cure period is ten (10) days for failure to pay rent or other monetary defaults; for other defaults, the cure period is thirty (30) days.
- (c) For nonmonetary defaults not capable of cure within sixty (60) days, State will not unreasonably withhold approval of a reasonable alternative cure schedule. Tenant must submit a cure schedule within thirty (30) days of a notice of default. The default is not an Event of Default if State approves the schedule and Tenant works diligently and in good faith to execute the cure. The default is an Event of Default if Tenant fails to timely submit a schedule or fails to cure in accordance with an approved schedule.
- (d) State may elect to deem a default by Tenant as an Event of Default if the default occurs within six (6) months after a default by Tenant for which State has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature.

**14.3 Remedies.**

- (a) Upon an Event of Default, State may terminate this Lease and remove Tenant by summary proceedings or otherwise.
- (b) If the Event of Default (1) arises from Tenant's failure to comply with restrictions on Permitted Use and operations under Paragraph 2.2 or (2) results in damage to natural resources or the Property, State may enter the Property without terminating this Lease to (1) restore the natural resources or Property and charge Tenant restoration costs and/or (2) charge Tenant for damages. On demand by State, Tenant shall pay all costs and/or damages.
- (c) Without terminating this Lease, State may relet the Property on any terms and conditions as State may decide are appropriate.
  - (1) State shall apply rent received by reletting: (1) to the payment of any indebtedness other than rent due from Tenant to State; (2) to the payment of any cost of such reletting; (3) to the payment of the cost of any alterations and repairs to the Property; and (4) to the payment of rent and leasehold excise tax due and unpaid under this Lease. State shall hold and apply any balance to Tenant's future rent as it becomes due.
  - (2) Tenant is responsible for any deficiency created by the reletting during any month and shall pay the deficiency monthly.
  - (3) At any time after reletting, State may elect to terminate this Lease for the previous Event of Default.
- (d) State's reentry or repossession of the Property under Paragraph 14.3 is not an election to terminate this Lease or cause a forfeiture of rents or other charges Tenant is obligated to pay during the balance of the Term, unless (1) State gives Tenant written notice of termination or (2) a legal proceeding decrees termination.
- (e) The remedies specified under this Paragraph 14.3 are not exclusive of any other remedies or means of redress to which the State is lawfully entitled for Tenant's breach or threatened breach of any provision of this Lease.





## SECTION 15 ENTRY BY STATE

State may enter the Property at any reasonable hour to inspect for compliance with the terms of this Lease, to monitor impacts to habitat, or survey habitat and species. Tenant grants State permission to cross Tenant's upland and aquatic land property to access the Property. State's failure to inspect the Property does not constitute a waiver of any rights or remedies under this Lease.

## SECTION 16 DISCLAIMER OF QUIET ENJOYMENT

### 16.1 No Guaranty or Warranty.

- (a) State believes that this Lease is consistent with the Public Trust Doctrine and that none of the third-party interests identified in Paragraph 1.1(b) will materially or adversely affect Tenant's right of possession and use of the Property, but State makes no guaranty or warranty to that effect.
- (b) State disclaims and Tenant releases State from any claim for breach of any implied covenant of quiet enjoyment. This disclaimer and release includes, but is not limited to, interference arising from exercise of rights under the Public Trust Doctrine; Treaty rights held by Indian Tribes; and the general power and authority of State and the United States with respect to aquatic lands and navigable waters.
- (c) Tenant is responsible for determining the extent of Tenant's right to possession and for defending Tenant's leasehold interest.

**16.2 Eviction by Third-Party.** If a third-party evicts Tenant, this Lease terminates as of the date of the eviction. In the event of a partial eviction, Tenant's rent obligations abate as of the date of the partial eviction, in direct proportion to the extent of the eviction; this Lease shall remain in full force and effect in all other respects.

## SECTION 17 NOTICE AND SUBMITTALS

Following are the locations for delivery of notice and submittals required or permitted under this Lease. Any Party may change the place of delivery upon ten (10) days written notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES  
Orca Straits District  
919 North Township Street  
Sedro-Woolley, WA 98284

Tenant: KONA RESIDENCE TRUST  
Attn: Allen D. Israel  
1111 3<sup>rd</sup> Ave., Ste. 3400  
Seattle, WA 98101

Aquatic Lands Lease



201205150052

Skagit County Auditor

Lease No. 20-A11236

The Parties may deliver any notice in person, by facsimile machine, or by certified mail. Depending on the method of delivery, notice is effective upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after mailing. All notices must identify the Lease number. On notices transmitted by facsimile machine, the Parties shall state the number of pages contained in the notice, including the transmittal page, if any.

## SECTION 18 MISCELLANEOUS

**18.1 Authority.** Tenant and the person or persons executing this Lease on behalf of Tenant represent that Tenant is qualified to do business in the State of Washington, that Tenant has full right and authority to enter into this Lease, and that each and every person signing on behalf of Tenant is authorized to do so. Upon State's request, Tenant shall provide evidence satisfactory to State confirming these representations.

**18.2 Successors and Assigns.** This Lease binds and inures to the benefit of the Parties, their successors, and assigns.

**18.3 Headings.** The headings used in this Lease are for convenience only and in no way define, limit, or extend the scope of this Lease or the intent of any provision.

**18.4 Entire Agreement.** This Lease, including the exhibits and addenda, if any, contains the entire agreement of the Parties. This Lease merges all prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Property.

**18.5 Waiver.**

- (a) The waiver of any breach or default of any term, covenant, or condition of this Lease is not a waiver of such term, covenant, or condition; of any subsequent breach or default of the same; or of any other term, covenant, or condition of this Lease. State's acceptance of a rental payment is not a waiver of any preceding or existing breach other than the failure to pay the particular rental payment that was accepted.
- (b) The renewal of the Lease, extension of the Lease, or the issuance of a new lease to Tenant, does not waive State's ability to pursue any rights or remedies under the Lease.

**18.6 Cumulative Remedies.** The rights and remedies under this Lease are cumulative and in addition to all other rights and remedies afforded by law or equity or otherwise.

**18.7 Time is of the Essence.** TIME IS OF THE ESSENCE as to each and every provision of this Lease.

**18.8 Language.** The word "Tenant" as used in this Lease applies to one or more persons and regardless of gender, as the case may be. If there is more than one Tenant, their obligations are joint and several. The word "persons," whenever used, shall include individuals, firms,

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associations, and corporations. The word "Parties" means State and Tenant in the collective. The word "Party" means either or both State and Tenant, depending on the context.

**18.9 Invalidity.** The invalidity, voidness, or illegality of any provision of this Lease does not affect, impair, or invalidate any other provision of this Lease.

**18.10 Applicable Law and Venue.** This Lease is to be interpreted and construed in accordance with the laws of the State of Washington. Venue for any action arising out of or in connection with this Lease is in the Superior Court for Thurston County, Washington.

**18.11 Statutory Reference.** Any reference to a statute means that statute as presently enacted or hereafter amended or superseded.

**18.12 Recordation.** At Tenant's expense and no later than thirty (30) days after receiving the fully-executed Lease, Tenant shall record this Lease in the county in which the Property is located. Tenant shall include the parcel number of the upland property used in conjunction with the Property, if any. Tenant shall provide State with recording information, including the date of recordation and file number. If Tenant fails to record this Lease, State may record it and Tenant shall pay the costs of recording upon State's demand.

**18.13 Modification.** No modification of this Lease is effective unless in writing and signed by both Parties. Oral representations or statements do not bind either Party.

**18.14 Survival.** Any obligations of Tenant not fully performed upon termination of this Lease do not cease, but continue as obligations of the Tenant until fully performed.



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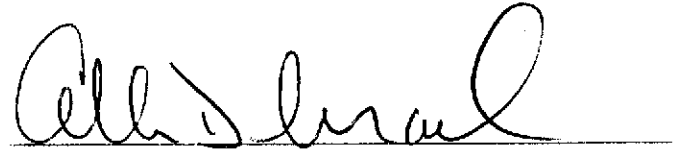
5/15/2012 Page 27 of 31 2:19PM

**18.15 Exhibits.** All referenced exhibits are incorporated in the Lease unless expressly identified as unincorporated.

THIS AGREEMENT requires the signature of all Parties and is effective on the date of the last signature below.

KONA RESIDENCE TRUST, a trust

Dated: April 19, 2012



By: ALLEN D. ISRAEL

Title: Trustee

Address: 1111 3<sup>rd</sup> Ave.  
Seattle, WA 98101

Phone: 206-447-8911

STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES

Dated: April 26, 2012



By: BRIDGET MORAN

Title: Deputy Supervisor

Address: 1111 Washington Street SE  
Olympia, WA 98504-7027

Approved as to form this  
12 day of March, 2010  
Janis Snoey, Assistant Attorney General

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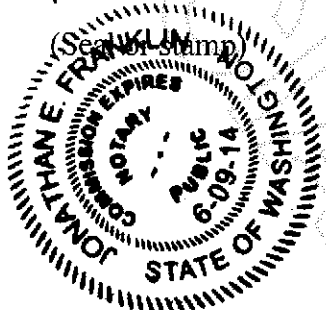
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STATE OF WASHINGTON )  
County of King ) ss

I certify that I know or have satisfactory evidence that ALLEN D. ISRAEL is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Trustee of Kona Residence Trust to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: April 9, 2012

[Signature]  
(Signature)  
JONATHAN E. FRANKLIN  
(Print Name)



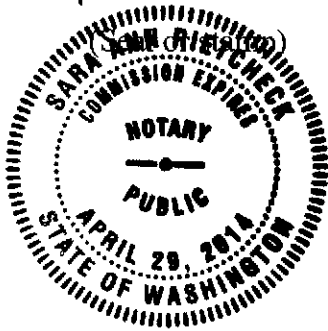
Notary Public in and for the State of Washington,  
residing at Seattle  
My appointment expires 6-9-14

STATE OF WASHINGTON )  
County of ) ss

I certify that I know or have satisfactory evidence that BRIDGET MORAN is the person who appeared before me, and said person acknowledged that she signed this instrument, on oath stated that she was authorized to execute the instrument and acknowledged it as the Deputy Supervisor of the Department of Natural Resources, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: April 26, 2012

[Signature]  
(Signature)  
Sara Ann Rietcheck  
(Print Name)



Notary Public in and for the State of Washington,  
residing at Olympia  
My appointment expires 4/29/14

Aquatic Lands Lease



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**EXHIBIT A**

Agreement Number 20-A11236

Recording number of final DNR approved survey in Skagit County:

Auditor's File No. 201012030114, December 3, 2010

**Metes and Bounds Narrative description of the Property:**

Tidelands of the second class and bed of Burrows Bay, owned by the state of Washington, situate in front of Government Lot 1, and Government Lot 2, Section 4, Township 34 N., Range 1 East, W. M., Described as follows:

Commencing at the northern meander corner of said Section 4, from which a monument stamped "Allan 1854, 1981" bears South 52 degrees 18'21" West at a distance of 3727.77 feet (grid bearing and distance on Washington State plane coordinate system North zone); thence South 10 degrees 15'12" East a distance of 990.36 feet to a point on the line of ordinary high water, being the true point of beginning; thence North 58 degrees 23'17" East a distance of 210.15 feet; thence South 38 degrees 43'53" East a distance of 398.71 feet; thence South 7 degrees 19'03" East a distance of 45.23 feet to the meander line; thence South 85 degrees 53'17" West along said meander line a distance of 132.00 feet; thence South 58 degrees 23'17" West along said meander line a distance of 231.00 feet; thence North 58 degrees 36'43" West along said meander line a distance of 158.40 feet; thence North 26 degrees 06'44" West along said meander line a distance of 207.75 feet to the line of ordinary high water; thence the following courses in distances along the line of ordinary high water:

Bearing	distance.
North 25 degrees 59'14" East	22.77 feet
North 42 degrees 01'28" East	35.06 feet
North 77 degrees 40'23" East	63.14 feet
North 27 degrees 01'14" East	20.48 feet
North 53 degrees 05'12" East	33.72 feet
North 50 degrees 19'35" West	13.70 feet

To the true point of beginning.

Square footage of each of these Use classifications:

Water-dependent	<u>149137.6</u>
<b>Total Square Feet</b>	<u><b>149137.6</b></u>

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**PLAN OF OPERATIONS  
EXHIBIT B**

**1. DESCRIPTION OF PERMITTED USE**

- A. Existing Facilities.** Consisting of a floating dock for private residential boat moorage and a floating breakwater. No additional improvements are anticipated.
- B. Proposed Facilities.** Tenant proposes no new facilities.

**2. ADDITIONAL OBLIGATIONS**

- (a) Tenant shall post the Property with no-wake advisories.
- (b) Tenant shall replace existing treated wood, (decking, timbers, pilings, etc.) with non-toxic materials such as untreated wood, steel, concrete, or recycled plastic, or encased in a manner that prevents leaching of contaminants into surface water. Tenant may use non-cresote treated wood to replace above water structural framing. Replacement may occur under an ordinary maintenance or repair schedule.
- (c) Tenant shall renovate or replace existing docks, rafts, floats, wharves and piers to provide 50 percent grated surface; grating material must have at least 60 percent functional open space. Replacement may occur under an ordinary maintenance or repair schedule.
- (d) Tenant shall replace existing tires with inert or encapsulated materials such as plastic or enclosed foam. Replacement may occur under an ordinary maintenance or repair schedule.

