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SEATTLE

AUG 17 1993

FILED \_\_\_\_\_ LODGED \_\_\_\_\_  
RECEIVED \_\_\_\_\_  
OCT - 8 1993  
BY \_\_\_\_\_ CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA DEPUTY

ENTERED ON DOCKET  
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AUG 16 1993

OCT - 8 1993  
By Deputy \_\_\_\_\_ AT SEATTLE  
BY \_\_\_\_\_ CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, )  
ON BEHALF OF THE UNITED STATES )  
ENVIRONMENTAL PROTECTION AGENCY, )  
THE UNITED STATES DEPARTMENT OF )  
THE INTERIOR, AND THE NATIONAL )  
OCEANIC AND ATMOSPHERIC )  
ADMINISTRATION; )  
STATE OF WASHINGTON; )  
PUYALLUP TRIBE OF INDIANS; )  
MUCKLESHOOT INDIAN TRIBE; )  
  
Plaintiffs, )  
  
v. )  
  
PORT OF TACOMA )  
  
Defendant )

C93 - 5462

Civil No.

COMMENCEMENT BAY  
NEARSHORE/TIDEFLATS  
SUPERFUND SITE; SITCUM  
WATERWAY PROBLEM AREA  
CONSENT DECREE

SITCUM WATERWAY  
CONSENT DECREE

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1 releases of hazardous substances from property owned, managed or  
2 operated by Settling Defendant within the Commencement Bay  
3 Environment (as defined in Paragraph 4); and (4) such other  
4 relief as the Court finds appropriate.

5 C. In accordance with the NCP and Section 121(f)(1)(F) of  
6 CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA has notified the State of  
7 Washington (the "State") of negotiations with potentially  
8 responsible parties regarding the implementation of the remedial  
9 design and remedial action for the Sitcum Waterway Problem Area,  
10 and EPA has provided the State with an opportunity to participate  
11 in such negotiations and be a party to this Consent Decree.

12 D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C.  
13 § 9622(j)(1), EPA has notified the federal, state, and tribal  
14 Natural Resource Trustees of negotiations with potentially  
15 responsible parties regarding the release of hazardous substances  
16 that may have resulted in injury to the natural resources under  
17 their trusteeship and encouraged the trustees to participate in  
18 the negotiation of this Consent Decree. The Natural Resource  
19 Trustees for the Sitcum Waterway Problem Area and Commencement  
20 Bay are: (1) the National Oceanic and Atmospheric Administration  
21 of the U.S. Department of Commerce, (2) the U.S. Department of  
22 the Interior, (3) the Washington Department of Ecology  
23 ("Ecology") (on behalf of the Washington Department of Fisheries,  
24 the Washington Department of Natural Resources, and the

1 Washington Department of Wildlife), (4) the Puyallup Tribe of  
2 Indians, and (5) the Muckleshoot Indian Tribe. These parties  
3 (the "Natural Resource Trustees") have participated in the  
4 negotiations, and have reached a settlement with the Settling  
5 Defendant of their claims for damages due to injury to,  
6 destruction of, or loss of natural resources caused by releases  
7 of hazardous substances from property owned, managed or operated  
8 by Settling Defendant within the Commencement Bay Environment,  
9 which includes the Sitcum Waterway Problem Area, Blair Waterway,  
10 and Milwaukee Waterway. The Natural Resource Trustees and the  
11 Settling Defendant agree that, on the basis of the preliminary  
12 information available regarding natural resource damages at the  
13 Sitcum Waterway Problem Area, Blair Waterway, and Milwaukee  
14 Waterway, and other parts of the Commencement Bay Environment,  
15 settlement of the claims as set forth in this Consent Decree is  
16 in the public interest and is made in good faith and after arms-  
17 length negotiations, and that entry of this Consent Decree is the  
18 most appropriate means to resolve the matters covered herein.

19 E. The Defendant that has entered into this Consent Decree  
20 ("Settling Defendant") does not admit any liability to the  
21 Plaintiffs arising out of the transactions or occurrences alleged  
22 in the complaint.

23 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, as  
24 amended, EPA placed the CB/NT Site in Tacoma, Washington, on the

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1 National Priorities List, set forth at 40 C.F.R. Part 300,  
2 Appendix B, by publication in the Federal Register on  
3 September 8, 1983, 48 Fed. Reg. 40,658.

4 G. Because of the complexity of the CB/NT site, Superfund  
5 response actions at the CB/NT site are currently coordinated  
6 under seven separate operable units managed primarily by EPA and  
7 Ecology, including: (1) Operable Unit 01 - CB/NT Sediments; (2)  
8 Operable Unit 02 - Asarco Tacoma Smelter; (3) Operable Unit 03 -  
9 Tacoma Tar Pits; (4) Operable Unit 04 - Asarco Off-Property; (5)  
10 Operable Unit 05 - CB/NT Sources; (6) Operable Unit 06 - Asarco  
11 Sediments; and (7) Operable Unit 07 - Asarco demolition. This  
12 Consent Decree involves the Sitcum Waterway sediment  
13 contamination, one of eight sediment Problem Areas within  
14 Operable Unit 01 of the Site identified for remedial action in  
15 the Record of Decision ("ROD") (Appendix C).

16 H. In 1983, in response to a release or a substantial threat  
17 of a release of hazardous substances at or from the Site, EPA  
18 entered into a CERCLA Cooperative Agreement with Ecology to  
19 conduct a Remedial Investigation and Feasibility Study ("RI/FS")  
20 at the Site. The results of the RI were published in August  
21 1985, and the results of the FS were published in February 1989.

22 I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA  
23 published notice of the completion of the FS and of the proposed  
24 plan for remedial action on February 24, 1989, in a major local

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1 newspaper of general circulation. EPA provided an opportunity  
2 for written and oral comments from the public on the proposed  
3 plan for remedial action. A copy of the transcript of the public  
4 meeting is available to the public as part of the administrative  
5 record upon which the Regional Administrator based the selection  
6 of the response action.

7 J. The decision by EPA on the remedial action to be  
8 implemented at the Site is embodied in a final Record of Decision  
9 ("ROD"), executed on September 30, 1989, on which the State and  
10 the Puyallup Tribe of Indians have given their concurrence. The  
11 ROD, for two operable units of the CB/NT site, includes EPA's  
12 explanation for any significant differences between the final  
13 plan and the proposed plan as well as a responsiveness summary to  
14 the public comments. Notice of the final plan was published in  
15 accordance with Section 117(b) of CERCLA.

16 K. The ROD addresses both sediment remediation (Operable  
17 Unit 01) and source control (Operable Unit 05). The ROD was  
18 concurred on by both the State and the Puyallup Tribe, with whom  
19 EPA has entered into Superfund Cooperative Agreements for  
20 remedial activities at the Site. Under a Cooperative Agreement  
21 with Ecology, effective May 1, 1989, and in the ROD, EPA is  
22 designated as the lead agency for remediation of contaminated  
23 sediments in the waterways and Commencement Bay, and Ecology as  
24 the lead agency for source control of hazardous substances in



1 upland areas (down to the mean high tidal elevation of the  
2 waterways). Source control is to be implemented in the upland  
3 areas that are contributing contamination to the areas identified  
4 in the ROD as requiring sediment remediation ("Problem Areas").  
5 A support agency Cooperative Agreement was entered into with the  
6 Puyallup Tribe.

7 L. As described in the RI/FS for the CB/NT site, there were  
8 nine Problem Areas of contaminated sediments and sources of  
9 hazardous substances contamination. The ROD addressed eight of  
10 these Problem Areas, including the Sitcum Waterway Problem Area.  
11 The ninth Problem Area, the Asarco Sediments, is now a separate  
12 operable unit of the CB/NT site and will be the subject of a  
13 subsequent ROD. This Consent Decree addresses remediation of the  
14 Sitcum Waterway Problem Area, and activities in the Blair  
15 Waterway, and the Milwaukee Waterway. The planned Remedial  
16 Action to be conducted pursuant to this Consent Decree will  
17 include activities in the Blair Waterway and the Milwaukee  
18 Waterway within the CB/NT Site.

19 M. On March 29, 1991, the Port of Tacoma entered into an  
20 Administrative Order on Consent ("AOC") with EPA for the  
21 preparation of, performance of, and reimbursement of oversight  
22 costs for the Remedial Design ("RD") for the Remedial Action  
23 ("RA") of the Sitcum Waterway Problem Area sediments. The  
24 objectives of the AOC were: (1) to design the Remedial Action

1 for the Sitcum Waterway Problem Area consistent with the ROD, and  
2 perform any analyses and studies needed by EPA to approve the  
3 Remedial Design for attaining the Sediment Cleanup Objectives  
4 identified in the ROD; (2) to collect and present information  
5 needed by the Natural Resource Trustees to aid the Trustees'  
6 determination of injury to natural resources and the assessment  
7 of natural resource damages within the Sitcum Waterway Problem  
8 Area, the Blair Waterway, and the Milwaukee Waterway; (3) to  
9 facilitate implementation of the Puyallup Settlement Agreement;  
10 and (4) to provide for recovery by EPA of its response and  
11 oversight costs incurred with respect to the implementation of  
12 the AOC.

13 N. On November 30, 1992, EPA published an evaluation of  
14 disposal options for contaminated sediments in the Sitcum  
15 Waterway that had been prepared by the Port of Tacoma and  
16 conditionally approved by EPA pursuant to the AOC. EPA made the  
17 evaluation available for a 60-day public comment period. In the  
18 evaluation, the Port of Tacoma recommended a plan called the  
19 "Sitcum Waterway Remediation Project," which proposes to  
20 coordinate dredging of the Sitcum Waterway Problem Area  
21 sediments, including sediments dredged for navigational purposes  
22 and other considerations, with dredging of Blair Waterway  
23 sediments for navigational purposes and as specified in the  
24 Puyallup Settlement Agreement. The Sitcum Waterway Problem Area

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1 sediments and certain designated Blair Waterway sediments would  
2 be disposed of in a nearshore confined disposal fill located in  
3 the Milwaukee Waterway. The area created by the fill would be  
4 used for expansion of an existing marine terminal facility.  
5 Sediments dredged from the Blair Waterway also would be used in  
6 the construction of a habitat mitigation area at and beyond the  
7 mouth of the Milwaukee Waterway. Under a separate permit to be  
8 issued by the U.S. Army Corps of Engineers, designated Blair  
9 Waterway sediments will be dredged and disposed of at the  
10 Washington Department of Natural Resources' Commencement Bay  
11 Puget Sound Dredge Disposal Analysis (PSDDA) open water disposal  
12 site. The Port's recommended plan included compensatory  
13 mitigation to offset unavoidable environmental impacts of the  
14 Sitcum Waterway Remediation Project.

15 O. After reviewing public comments, EPA instructed the Port  
16 to proceed under the AOC to prepare and submit for EPA approval  
17 the Remedial Design plans and specifications for the Sitcum  
18 Waterway Remediation Project. This Consent Decree governs  
19 implementation of the Remedial Design activities set forth in  
20 those design plans and specifications approved by EPA pursuant to  
21 the AOC. The AOC remains in effect until the Remedial Design is  
22 completed.

23 P. EPA has issued an Explanation of Significant Differences  
24 ("ESD"), pursuant to the NCP at 40 C.F.R § 300.435(c)(2), that

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1 explains differences in the Remedial Action that significantly  
2 change, but do not fundamentally alter, the remedy selected in  
3 the ROD. The ESD provides details of: EPA's decision to dispose  
4 of Sitcum Waterway Problem Area sediments in a nearshore confined  
5 disposal fill located in the Milwaukee Waterway; habitat  
6 mitigation for the Remedial Action; the volume of sediments to be  
7 remediated; and the cost of the Remedial Action. EPA has  
8 determined that the Sitcum Waterway Remediation Project, if  
9 implemented by the Port in accordance with the approved Remedial  
10 Design documents and the requirements of this Consent Decree and  
11 its appendices, will attain the Sediment Quality Objectives set  
12 forth in the ROD, and will meet or attain all federal, tribal and  
13 state applicable or relevant and appropriate legal requirements,  
14 criteria or limitations, including the Clean Water Act (33 U.S.C.  
15 §§ 401 et seq.).

16 Q. Based on the information currently available to EPA and  
17 the Natural Resource Trustees, EPA and the Natural Resource  
18 Trustees believe that the Work will be properly and promptly  
19 conducted by the Settling Defendant if conducted in accordance  
20 with Remedial Design plans and specifications approved by EPA  
21 under the AOC, and the requirements of this Consent Decree and  
22 its appendices.

23 R. Solely for the purposes of Section 113(j) of CERCLA, the  
24 Remedial Action selected by the ROD and the Work to be performed

1 | by the Settling Defendant shall constitute a response action  
2 | taken or ordered by the President.

3 |       S. In addition to addressing the Remedial Action for the  
4 | Sitcum Waterway Problem Area sediments, this Consent Decree  
5 | incorporates the terms of a settlement of claims by the Natural  
6 | Resource Trustees against Settling Defendant for Natural Resource  
7 | Damages as a result of releases of hazardous substances (as that  
8 | term is defined at 42 U.S.C. § 9601(14)) for which the Settling  
9 | Defendant may be responsible. Although the Natural Resource  
10 | Trustees have initiated but not yet completed a natural resource  
11 | damage assessment for the Commencement Bay Environment, the  
12 | Natural Resource Trustees have concluded that they can determine  
13 | with a reasonable degree of reliability the level of damages  
14 | appropriate to assign to Settling Defendant for settlement  
15 | purposes.

16 |       T. The Parties recognize, and the Court by entering this  
17 | Consent Decree finds, that this Consent Decree has been  
18 | negotiated by the Parties in good faith and implementation of  
19 | this Consent Decree will expedite the cleanup of the Site and  
20 | will avoid prolonged and complicated litigation between the  
21 | Parties, and that this Consent Decree is fair, reasonable, and in  
22 | the public interest.

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1 NOW, THEREFORE, it is hereby Ordered, Adjudged, and  
2 Decreed:

3 II. JURISDICTION

4 1. This Court has jurisdiction over the subject matter of  
5 this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C.  
6 §§ 9606, 9607, and 9613(b). This Court also has personal  
7 jurisdiction over the Settling Defendant. Solely for the  
8 purposes of this Consent Decree and the underlying complaint,  
9 Settling Defendant waives all objections and defenses that it may  
10 have to jurisdiction of the Court or to venue in this District.  
11 Settling Defendant shall not challenge the terms of this Consent  
12 Decree or this Court's jurisdiction to enter and enforce this  
13 Consent Decree.

14 III. PARTIES BOUND

15 2. This Consent Decree applies to and is binding upon the  
16 United States and the Natural Resource Trustees and upon the  
17 Settling Defendant and its successors and assigns. Any change in  
18 ownership or corporate status of Settling Defendant including,  
19 but not limited to, any transfer of assets or real or personal  
20 property shall in no way alter such Settling Defendant's  
21 responsibilities under this Consent Decree.

22 3. Settling Defendant shall provide a copy of this Consent  
23 Decree, including its Appendices, to each contractor hired to  
24 perform the Work (as defined below) required by this Consent

1 Decree and to each person representing Settling Defendant with  
2 respect to the Site or the Work and shall condition all contracts  
3 entered into hereunder upon performance of the Work in conformity  
4 with the terms of this Consent Decree. Settling Defendant or its  
5 contractors shall provide written notice of the Consent Decree to  
6 all subcontractors hired to perform any portion of the Work  
7 required by this Consent Decree. Settling Defendant shall  
8 nonetheless be responsible for ensuring that its contractors and  
9 subcontractors perform the Work contemplated herein in accordance  
10 with this Consent Decree. With regard to the activities  
11 undertaken pursuant to this Consent Decree, the Settling  
12 Defendant shall be deemed to be in a contractual relationship  
13 with each contractor and subcontractor within the meaning of  
14 Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

15 IV. DEFINITIONS

16 4. Unless otherwise expressly provided herein, terms used in  
17 this Consent Decree which are defined in CERCLA or in regulations  
18 promulgated under CERCLA shall have the meaning assigned to them  
19 in CERCLA or in such regulations. Whenever terms listed below  
20 are used in this Consent Decree or in the appendices attached  
21 hereto and incorporated hereunder, the following definitions  
22 shall apply:

23 "Additional Mitigation Project" shall mean that portion of the  
24 Sitcum Waterway Remediation Project that is designed under the

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1 AOC and this Consent Decree, and implemented by the Settling  
2 Defendant under this Consent Decree at the Clear Creek/Swan Creek  
3 site, as described in Appendix A to this Consent Decree, or at  
4 another location approved by EPA, to provide adequate  
5 compensatory mitigation for the functions and values of habitats  
6 adversely impacted due to construction of the Sitcum Waterway  
7 Remediation Project, but not otherwise mitigated during other  
8 phases of the Sitcum Waterway Remediation Project.

9 "Administrative Order on Consent" or "AOC" shall mean the  
10 Administrative Order on Consent for Remedial Design Study of the  
11 Sitcum Waterway between the Port of Tacoma and EPA, U.S. EPA  
12 Docket No. 1091-01-04-122, March 29, 1991, which is Appendix B to  
13 and incorporated into this Consent Decree. The AOC remains in  
14 full force and effect, notwithstanding the entry of the Consent  
15 Decree. Wherever terms of the AOC conflict with terms of the  
16 Consent Decree, the terms of the Consent Decree will control.

17 "Blair Waterway" shall mean the entire Blair Waterway below  
18 the top of the bank, which is located in the industrial tideflats  
19 area of the City of Tacoma between the Hylebos Waterway to the  
20 northeast and the Sitcum Waterway to the southwest, as shown on  
21 Figure 1 of the ROD.

22 "CERCLA" shall mean the Comprehensive Environmental Response,  
23 Compensation, and Liability Act of 1980, as amended, 42 U.S.C.  
24 §§ 9601 et seq.



1 "Commencement Bay Environment" shall consist of the Site, as  
2 defined below, plus areas of Commencement Bay between the Site  
3 and a line drawn from Point Defiance to Dash Point.

4 "Consent Decree" shall mean this Decree and all appendices  
5 attached hereto (listed in Section XXX). In the event of  
6 conflict between this Decree, the AOC, and any appendix, this  
7 Decree shall control.

8 "Day" shall mean a calendar day unless expressly stated to be  
9 a working day. "Working day" shall mean a day other than a  
10 Saturday, Sunday, or Federal holiday. In computing any period of  
11 time under this Consent Decree, where the last day would fall on  
12 a Saturday, Sunday, or Federal holiday, the period shall run  
13 until the close of business of the next working day.

14 "EPA" shall mean the United States Environmental Protection  
15 Agency and any successor departments or agencies of the United  
16 States.

17 "Future Response Costs" shall mean all costs, including, but  
18 not limited to, direct and indirect costs, that the United States  
19 incurs in reviewing or developing plans, reports and other items  
20 pursuant to this Consent Decree, verifying the Work, or otherwise  
21 implementing, overseeing, or enforcing this Consent Decree,  
22 including, but not limited to, payroll costs, contractor costs,  
23 travel costs, laboratory costs, the costs incurred pursuant to  
24 Sections VII, VIII, X (including, but not limited to, attorneys

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1 fees and the amount of just compensation), XVI, and Paragraph 84  
2 of Section XXII. Future Response Costs shall also include all  
3 costs, including direct and indirect costs, paid by the United  
4 States in connection with the Sitcum Waterway Remediation Project  
5 and not reimbursed under the AOC and incurred between September  
6 30, 1992 and the effective date of this Consent Decree, and all  
7 interest on the Past Response Costs from March 16, 1993 to the  
8 date the Settling Defendant makes payment of Past Response Costs  
9 not reimbursed under the AOC.

10 "Future Trustee Assessment Costs" shall mean all costs,  
11 including, but not limited to, direct and indirect costs, that  
12 the Natural Resource Trustees incur in reviewing or developing  
13 plans, reports and other items pursuant to this Consent Decree,  
14 verifying the Work, or otherwise implementing, overseeing, or  
15 enforcing this Consent Decree, including, but not limited to,  
16 payroll costs, contractor costs, travel costs, laboratory costs,  
17 the costs incurred pursuant to Sections VII, VIII, X (including,  
18 but not limited to, attorneys fees and the amount of just  
19 compensation), XVI, and Paragraph 84 of Section XXII. Future  
20 Trustee Assessment Costs shall also include all costs, including  
21 direct and indirect costs, paid by the Natural Resource Trustees  
22 in connection with the Sitcum Waterway Problem Area, the  
23 Milwaukee Waterway, and the Blair Waterway incurred between March  
24 16, 1993 and the effective date of this Consent Decree. In

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1 calculating Future Trustee Assessment Costs, the Natural Resource  
2 Trustees will take into account the extent to which any estimates  
3 used to determine Past Trustee Assessment Costs subsequently  
4 prove to have understated or overstated the actual amount of Past  
5 Trustee Assessment Costs. "Future Trustee Assessment Costs"  
6 shall also include the costs of further assessment of Natural  
7 Resource Damages for the Commencement Bay Environment, subject to  
8 the limitations provided below at Paragraph 51.c.

9 "Lead Natural Resource Trustee" shall mean the National  
10 Oceanic and Atmospheric Administration.

11 "Milwaukee Waterway" shall mean the entire Milwaukee Waterway  
12 below the top of the bank, which is located in the industrial  
13 tideflats of the City of Tacoma between the Sitcum Waterway to  
14 the northeast and the Puyallup River to the southwest, as shown  
15 on Figure 1 of the ROD.

16 "National Contingency Plan" or "NCP" shall mean the National  
17 Oil and Hazardous Substances Pollution Contingency Plan  
18 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,  
19 codified at 40 C.F.R. Part 300, including, but not limited to,  
20 any amendments thereto.

21 "Natural Resources" shall have the meaning provided in Section  
22 101(16) of CERCLA, 42 U.S.C. § 9601(16).

23 "Natural Resource Damages" means damages, including costs of  
24 damages assessment, recoverable under Section 107 of CERCLA or

1 Chapter 70.105D RCW for injury to, destruction of, or loss of  
2 Natural Resources resulting from releases of hazardous substances  
3 into the Commencement Bay Environment.

4 "Natural Resource Trustees" shall mean those entities  
5 identified as such pursuant to Section 107(f) of CERCLA and  
6 Subpart G of the National Contingency Plan, 40 C.F.R. §§ 300.600  
7 through 300.615, and include the National Oceanic and Atmospheric  
8 Administration of the U.S. Department of Commerce, and the U.S.  
9 Department of the Interior (hereinafter the "federal Natural  
10 Resource Trustees"), and the Washington Department of Ecology (on  
11 behalf of the Washington Department of Fisheries, the Washington  
12 Department of Natural Resources, and the Washington Department of  
13 Wildlife), the Puyallup Tribe of Indians, and the Muckleshoot  
14 Indian Tribe (hereinafter the "other Natural Resource Trustees").

15 "Operation and Maintenance and Monitoring Plan" or "OMM Plan"  
16 shall mean all activities required to maintain and monitor the  
17 effectiveness of the Remedial Action and to provide for  
18 contingencies, as required under the Post-Remedial Action  
19 Operation and Maintenance and Monitoring Plan approved by EPA  
20 pursuant to the AOC, which is incorporated into and made  
21 enforceable under this Consent Decree.

22 "Paragraph" shall mean a portion of this Consent Decree  
23 identified by an arabic numeral or an upper case letter.

1 "Parties" shall mean the United States, the Natural Resource  
2 Trustees, and the Settling Defendant.

3 "Past Response Costs" shall mean all costs, including, but not  
4 limited to, direct and indirect costs and interest, that the  
5 United States incurred and paid, with regard to the Sitcum  
6 Waterway Problem Area, the Blair Waterway, and the Milwaukee  
7 Waterway not reimbursed under the AOC and incurred prior to  
8 September 30, 1992 by EPA, as set forth in Paragraph 51.a.

9 "Past Trustee Assessment Costs" shall mean all costs,  
10 including, but not limited to, direct and indirect costs, that  
11 the Natural Resource Trustees incurred and paid with regard to  
12 the Sitcum Waterway Problem Area, the Blair Waterway, and the  
13 Milwaukee Waterway prior to March 16, 1993, as set forth in  
14 Paragraph 51.b.

15 "Performance Standards" shall mean those cleanup standards,  
16 standards of control, and other substantive requirements,  
17 criteria or limitations, including Sediment Quality Objectives,  
18 construction and post-construction standards, and habitat  
19 mitigation standards, set forth in the ROD, the Remedial Design  
20 plans, specifications, documents and their attachments, as  
21 approved by EPA pursuant to the AOC and the Consent Decree, and  
22 the OMM plan as approved by EPA pursuant to the AOC and the  
23 Consent Decree.

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1 "Plaintiffs" shall mean the United States, the State of  
2 Washington in its capacity as a Natural Resource Trustee, the  
3 Puyallup Tribe of Indians, and the Muckleshoot Tribe.

4 "Record of Decision" or "ROD" shall mean the EPA Record of  
5 Decision set forth as Appendix C to this Consent Decree relating  
6 to the Commencement Bay Nearshore/Tideflats Superfund Site,  
7 including the Sitcum Waterway Problem Area, signed on  
8 September 30, 1989, by the Regional Administrator, EPA Region 10,  
9 and all attachments thereto, and the Explanation of Significant  
10 Differences which provides further details of the Remedial Action  
11 for the Sitcum Waterway Problem Area.

12 "Remedial Action" shall mean those activities, except for  
13 Operation and Maintenance and Monitoring, to be undertaken by the  
14 Settling Defendant to implement the final Remedial Design plans,  
15 specifications, documents and their attachments, for the Sitcum  
16 Waterway Remediation Project, including the Additional Mitigation  
17 Project, submitted by the Settling Defendant pursuant to the AOC  
18 and this Consent Decree, and approved by EPA.

19 "Remedial Design" shall mean those activities undertaken by  
20 the Settling Defendant pursuant to the AOC and this Consent  
21 Decree to develop the final Remedial Design plans,  
22 specifications, documents and their attachments, for the Sitcum  
23 Waterway Remediation Project that will be implemented to attain  
24 the Sediment Quality Objectives for the Sitcum Waterway Problem

1 Area established in the ROD, to comply with all federal and state  
2 applicable or relevant and appropriate requirements identified in  
3 the ROD, and to mitigate for unavoidable environmental impacts  
4 from the remedial action.

5 "Section" shall mean a portion of this Consent Decree  
6 identified by a roman numeral.

7 "Sediment Quality Objectives" mean those discrete and  
8 measurable cleanup levels for sediments to be attained in the  
9 Remedial Action that were established in the ROD, as set forth in  
10 Table 5 of the ROD and listed in Appendix D to this Consent  
11 Decree.

12 "Settling Defendant" shall mean the Port of Tacoma.

13 "Sitcum Waterway Problem Area" refers to the entire Sitcum  
14 Waterway below the top of the bank, which is located in the  
15 industrial tideflats area of the City of Tacoma between the Blair  
16 Waterway to the northeast and Milwaukee Waterway to the  
17 southwest, as described in the ROD.

18 "Sitcum Waterway Remediation Project" shall mean all of the  
19 activities approved by EPA in the Remedial Design under the AOC  
20 or under this Consent Decree that are related to the cleanup and  
21 dredging of sediments in the Sitcum Waterway Problem Area, to the  
22 dredging of sediments in the Blair Waterway, to the disposal in  
23 the Milwaukee Waterway of sediments from both the Sitcum Waterway  
24 and Blair Waterway, to the placement of Blair Waterway sediments

1 at and beyond the mouth of the Milwaukee Waterway, and to the  
2 implementation of mitigation projects at and beyond the mouth of  
3 the Milwaukee Waterway and at the Additional Mitigation Project  
4 to compensate for the impacts associated with such activities.

5 "Site" shall mean the entire Commencement Bay  
6 Nearshore/Tideflats Superfund Site and project area, located in  
7 Tacoma, Washington, as defined in the ROD, which includes within  
8 its boundaries the Sitcum Waterway Problem Area, the Blair  
9 Waterway, and the Milwaukee Waterway.

10 "State" shall mean the State of Washington.

11 "Supervising Contractor" shall mean the principal contractor  
12 supervising and directing the implementation of the Work under  
13 this Consent Decree. The Settling Defendant may be the  
14 Supervising Contractor.

15 "United States" shall mean the United States of America.

16 "Waste Material" shall mean (1) any "hazardous substance"  
17 under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any  
18 pollutant or contaminant under Section 101(33), 42 U.S.C.  
19 § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA,  
20 42 U.S.C. § 6903(27); and (4) any "dangerous waste" under the  
21 Washington Hazardous Waste Management Act, Chapter 70.105 RCW and  
22 Chapter 173-303 WAC.

23 "Work" shall mean all activities Settling Defendant is  
24 required to perform under this Consent Decree to implement the



1 Remedial Action, operation and maintenance, and monitoring for  
2 the Sitcum Waterway Remediation Project, except those required by  
3 Section XXVI (Retention of Records).

4 V. GENERAL PROVISIONS

5 5. Objectives of the Parties

6 The objectives of the Parties in entering into this Consent  
7 Decree are to protect public health or welfare or the environment  
8 at the Site by the implementation of response actions at the Site  
9 by the Settling Defendant, to contribute to restoration of  
10 habitat and natural resources as compensation for past activities  
11 that injured natural resources, and to reimburse response and  
12 assessment costs of the Plaintiffs.

13 6. Commitments by Settling Defendant

14 Settling Defendant shall finance and perform the Work in  
15 accordance with this Consent Decree and all plans, standards,  
16 specifications, and schedules set forth in or developed and  
17 approved by EPA pursuant to the AOC and this Consent Decree.  
18 Settling Defendant shall also reimburse the United States for  
19 Past Response Costs and Future Response Costs, compensate the  
20 Natural Resource Trustees for Natural Resource Damages, and  
21 reimburse the Natural Resource Trustees for Past Trustee  
22 Assessment Costs and Future Trustee Assessment Costs, as provided  
23 in this Consent Decree.

1        7. Compliance With Applicable Law

2        Except as provided in Paragraph 8.a, all activities undertaken  
3 by Settling Defendant pursuant to this Consent Decree shall be  
4 performed in accordance with the requirements of all applicable  
5 federal, tribal, and state laws and regulations. Settling  
6 Defendant must also comply with all applicable or relevant and  
7 appropriate requirements of all Federal and state environmental  
8 laws as set forth in the ROD and the final remedial design  
9 documents. The activities conducted pursuant to this Consent  
10 Decree, if approved by EPA, shall be considered to be consistent  
11 with the NCP.

12        8. Permits

13            a. As provided in Section 121(e) of CERCLA and §300.5 of  
14 the NCP, no permit shall be required for any portion of the Work  
15 covered by this Consent Decree that is conducted entirely within  
16 the Site. Where any portion of the Work requires a federal or  
17 state permit or approval, Settling Defendant shall submit timely  
18 and complete applications and take all other actions necessary to  
19 obtain all such permits or approvals.

20            b. The Settling Defendant may seek relief under the  
21 provisions of Section XIX (Force Majeure) of this Consent Decree  
22 for any delay in the performance of the Work resulting from a  
23 failure to obtain, or a delay in obtaining, any permit required  
24 for the Work, where Settling Defendant shows that (1) it

1 submitted timely and complete applications, (2) took all other  
2 actions necessary to obtain all such permits or approvals, and  
3 (3) took no action, either directly or indirectly, to challenge,  
4 appeal or delay the issuance of a permit if the permit activity  
5 is substantially consistent with the Remedial Design for Work  
6 approved under this Consent Decree or the AOC.

7 c. This Consent Decree is not, and shall not be  
8 construed to be, a permit issued pursuant to any federal or state  
9 statute or regulation.

10 9. Notice of Obligations to Successors-in-Title

11 a. Within fifteen (15) days after the entry of this  
12 Consent Decree, the Settling Defendant shall record a certified  
13 copy of this Consent Decree with the Registry of Deeds, Pierce  
14 County, State of Washington. Thereafter, each deed, title, or  
15 other instrument conveying an interest in the property included  
16 in the Sitcum Waterway Remediation Project shall contain a notice  
17 stating that the property is subject to this Consent Decree and  
18 shall reference the recorded location of the Consent Decree and  
19 any restrictions applicable to the property under this Consent  
20 Decree.

21 b. The obligations of the Settling Defendant with  
22 respect to the provision of access under Section X (Access) and  
23 the implementation of institutional controls shall be binding  
24 upon the Settling Defendant and any and all persons who

1 subsequently acquire any such interest or portion thereof  
2 (hereinafter "Successors-in-Title"). Within 15 days after the  
3 entry of this Consent Decree, Settling Defendant shall record at  
4 the Registry of Deeds a notice of obligation to provide access  
5 under Section X (Access) and related covenants. Each subsequent  
6 instrument conveying an interest to any such property included in  
7 the Sitcum Waterway Remediation Project shall reference the  
8 recorded location of such notice and covenants applicable to the  
9 property.

10 c. The Settling Defendant and any Successor-in-Title  
11 shall, at least thirty (30) days prior to the conveyance of any  
12 such interest, give written notice of this Consent Decree to the  
13 grantee and written notice to EPA and the State of the proposed  
14 conveyance, including the name and address of the grantee, and  
15 the date on which notice of the Consent Decree was given to the  
16 grantee. In the event of any such conveyance, the Settling  
17 Defendant's obligations under this Consent Decree, including  
18 their obligations to provide or secure access pursuant to Section  
19 X, shall continue to be met by the Settling Defendant. In  
20 addition, if the United States approves, the grantee may perform  
21 some or all of the Work under this Consent Decree. In no event  
22 shall the conveyance of an interest in property that includes, or  
23 is a portion of, the Sitcum Waterway Remediation Project area

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1 release or otherwise affect the liability of the Settling  
2 Defendant to comply with the Consent Decree.

3 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

4 10. Selection of Supervising Contractor.

5 a. All aspects of the Work to be performed by Settling  
6 Defendant pursuant to Sections VI (Performance of the Work by  
7 Settling Defendant), VII (Additional Response Actions), VIII  
8 (U.S. EPA Periodic Review), and IX (Quality Assurance, Sampling  
9 and Data Analysis) of this Consent Decree shall be under the  
10 direction and supervision of the Supervising Contractor, the  
11 selection of which shall be subject to disapproval by EPA.

12 Within ten (10) days after the lodging of this Consent Decree,  
13 Settling Defendant shall notify EPA in writing of the name,  
14 title, and qualifications of any contractor proposed to be the  
15 Supervising Contractor. EPA will issue a notice of disapproval  
16 or an authorization to proceed. If at any time thereafter,  
17 Settling Defendant proposes to change a Supervising Contractor,  
18 Settling Defendant shall give such notice to EPA and must obtain  
19 an authorization to proceed from EPA before the new Supervising  
20 Contractor performs, directs, or supervises any Work under this  
21 Consent Decree.

22 b. If EPA disapproves a proposed Supervising Contractor,  
23 EPA will notify the Settling Defendant in writing. Settling  
24 Defendant shall submit to EPA a list of contractors, including

1 the qualifications of each contractor, that would be acceptable  
2 to them within thirty (30) days of receipt of EPA's disapproval  
3 of the contractor previously proposed. EPA will provide written  
4 notice of the names of any contractor(s) that it disapproves and  
5 an authorization to proceed with respect to any of the other  
6 contractors. Settling Defendant may select any contractor from  
7 that list that is not disapproved and shall notify EPA of the  
8 name of the contractor selected within twenty-one (21) days of  
9 EPA's authorization to proceed.

10 c. If EPA fails to provide written notice of its  
11 authorization to proceed or disapproval as provided in this  
12 Paragraph and this failure prevents the Settling Defendant from  
13 meeting one or more deadlines in a plan approved by the EPA  
14 pursuant to this Consent Decree, Settling Defendant may seek  
15 relief under the provisions of Section XIX (Force Majeure)  
16 hereof.

17 11. Remedial Design.

18 Settling Defendant shall submit Remedial Design documents  
19 to EPA and the State in accordance with the requirements and  
20 schedules established in the AOC or this Consent Decree. Upon  
21 approval by EPA, the Remedial Design documents shall be  
22 incorporated into and become enforceable under this Consent  
23 Decree.

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1       12. Additional Mitigation Project Remedial Design. Settling  
2 Defendant shall submit the draft final Remedial Design documents  
3 required by EPA for approval of the Additional Mitigation Project  
4 within one (1) year after EPA direction, in writing, to proceed  
5 with the Work or a portion of the Work under this Consent Decree,  
6 in accordance with the procedures and requirements of the AOC for  
7 Remedial Design documents. The draft final Remedial Design  
8 documents shall include, among other requirements, Performance  
9 Standards, a plan for Operation and Maintenance and Monitoring, a  
10 contingency plan, a construction quality assurance plan, and a  
11 health and safety plan.

12           a. The Remedial Design for the Additional Mitigation  
13 Project shall provide for the commencement of substantial and  
14 continuous physical on-site activities to construct the  
15 Additional Mitigation Project within two (2) years after EPA  
16 direction, in writing, to proceed with the Work or a portion of  
17 the Work under this Consent Decree.

18           b. If substantial and continuous physical on-site  
19 construction of the Additional Mitigation Project is not  
20 commenced within two (2) years after EPA direction, in writing,  
21 to proceed with the Work or a portion of the Work under this  
22 Consent Decree, the Remedial Design prepared by the Settling  
23 Defendant for the Additional Mitigation Project shall increase  
24 the size of habitat acreage of the Additional Mitigation Project

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28 SITCUM WATERWAY  
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1 by ten percent (10%) for each year that commencement of  
2 substantial and continuous physical on-site construction  
3 activities is delayed. For purposes of this subsection, a delay  
4 of any portion of a year beyond two (2) years after EPA  
5 direction, in writing, to proceed with the Work or a portion of  
6 the Work under this Consent Decree shall be considered an entire  
7 year for calculating the increase in size of the Additional  
8 Mitigation Project.

9 c. If substantial and continuous physical on-site  
10 construction of the Additional Mitigation Project is not  
11 initiated within four (4) years after EPA direction, in writing,  
12 to proceed with the Work or a portion of the Work under this  
13 Consent Decree, the Remedial Design prepared by the Settling  
14 Defendant shall increase the size of habitat acreage of the  
15 Additional Mitigation Project by ten percent (10%) for each six  
16 (6) months that commencement of substantial and continuous  
17 physical on-site construction activities is delayed. For  
18 purposes of this subsection, a delay of any portion of a month  
19 beyond each six month period beyond four (4) years after EPA  
20 direction, in writing, to proceed with the Work or a portion of  
21 the Work under this Consent Decree shall be considered a six (6)  
22 month period for calculating the increase in size of the  
23 Additional Mitigation Project.

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1           d. Settling Defendant may request that EPA approve  
2 modifying the Additional Mitigation Project requirements so as to  
3 incorporate the Additional Mitigation Project into a larger  
4 habitat restoration or mitigation project. The Settling  
5 Defendant may request that EPA approve a one (1) year extension  
6 to Paragraph 12.a. without penalty, to accommodate and facilitate  
7 the provisions of this Paragraph. The decision whether to  
8 approve such a modification or extension shall be at the sole  
9 discretion of EPA based on the goals and purposes of the proposed  
10 mitigation project. EPA's decision shall be subject to Dispute  
11 Resolution under Section XX, but shall not be subject to judicial  
12 review, including judicial review under Paragraphs 65 and 66.

13           e. If, prior to EPA approval of the Remedial Design for  
14 the Additional Mitigation Project identified in Appendix A to the  
15 Consent Decree, EPA finds that the Additional Mitigation Project  
16 cannot be implemented to attain the desired function of  
17 utilization as refuge habitat by juvenile salmonids from Puyallup  
18 River stocks, which will be a Performance Standard set forth in  
19 the monitoring plan approved pursuant to the Consent Decree, the  
20 Port will identify and implement a substitute Additional  
21 Mitigation Project which will attain this Performance Standard  
22 and will provide 9.5 acres of restored habitat, of which a  
23 minimum of 6 acres is regularly wetted, to compensate for  
24 environmental impacts associated with the Sitcum Waterway

1 Remediation Project. Plans for the substitute Additional  
2 Mitigation Project are to be submitted, approved, and implemented  
3 pursuant to this Paragraph.

4 f. Settling Defendant shall include in the contingency  
5 plans prepared pursuant to this Paragraph the development of  
6 additional mitigation which, along with the Additional Mitigation  
7 Project, will meet the requirements of Paragraph 12.e. in the  
8 event that the Additional Mitigation Project, after implementing  
9 all contingency measures set forth in the contingency plan and  
10 approved by EPA, fails to attain the Performance Standard of  
11 providing refuge habitat for the utilization by juvenile  
12 salmonids migrating into Clear Creek from the Puyallup River.

13 13. Remedial Action.

14 a. The Settling Defendant shall implement the Remedial  
15 Action in accordance with (1) the final Remedial Design plans,  
16 specifications, and documents approved by EPA under the AOC; (2)  
17 the Construction Quality Assurance Plan approved by EPA under the  
18 AOC, including the approved schedules of tasks; (3) the Remedial  
19 Action Health and Safety Plan approved by EPA under the AOC; (4)  
20 the Post-Remedial Action Operation and Maintenance and Monitoring  
21 (OMM) Plan approved by EPA under the AOC; and (5) the Additional  
22 Mitigation Project Remedial Design plans, specifications and  
23 documents approved by EPA under this Consent Decree. Settling  
24 Defendant shall make best efforts at its own expense to enter

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1 | directed by EPA, Settling Defendant shall not commence physical  
2 | on-site remedial activities at the Additional Mitigation Project  
3 | prior to both EPA approval of the relevant Additional Mitigation  
4 | Project Remedial Design documents under this Consent Decree and  
5 | EPA direction, in writing, to proceed with the remedial  
6 | activities.

7 | 14. The Work performed by the Settling Defendant pursuant to  
8 | this Consent Decree shall include the obligation to achieve the  
9 | Performance Standards, including Sediment Quality Objectives,  
10 | construction and post-construction standards, and habitat  
11 | mitigation standards set forth in the ROD and documents approved  
12 | by EPA under the AOC. Settling Defendant shall demonstrate  
13 | compliance with each Performance Standard in a manner that is  
14 | approved by EPA. If a Performance Standard is not attained,  
15 | Settling Defendant shall implement contingency plans to take  
16 | corrective actions, pursuant to Remedial Design documents  
17 | approved by EPA under the AOC, or Settling Defendant shall  
18 | initiate Additional Response Actions, as approved by EPA.

19 | 15. Settling Defendant acknowledges and agrees that nothing  
20 | in this Consent Decree or the Remedial Design documents,  
21 | constitutes a warranty or representation of any kind by  
22 | Plaintiffs that compliance with the work requirements set forth  
23 | in the remedial design documents will achieve the Performance  
24 | Standards. Settling Defendant's compliance with the work

1 requirements shall not foreclose Plaintiffs from seeking  
2 compliance with all terms and conditions of this Consent Decree,  
3 including, but not limited to, the applicable Performance  
4 Standards.

5 16. Settling Defendant shall, prior to any off-Site shipment  
6 of Waste Material from the Site to an out-of-state waste  
7 management facility, provide written notification to the  
8 appropriate state environmental official in the receiving  
9 facility's state and to the EPA Project Coordinator of such  
10 shipment of Waste Material. However, this notification  
11 requirement shall not apply to any off-Site shipments when the  
12 total volume of all such shipments will not exceed 10 cubic  
13 yards.

14 a. The Settling Defendant shall include in the written  
15 notification the following information, where available: (1) the  
16 name and location of the facility to which the Waste Material is  
17 to be shipped; (2) the type and quantity of the Waste Material to  
18 be shipped; (3) the expected schedule for the shipment of the  
19 Waste Material; and (4) the method of transportation. The  
20 Settling Defendant shall notify the state in which the planned  
21 receiving facility is located of major changes in the shipment  
22 plan, such as a decision to ship the Waste Material to another  
23 facility within the same state, or to a facility in another  
24 state.

1           b. The identity of the receiving facility and state will  
2 be determined by the Settling Defendant following the award of  
3 the contract for Remedial Action construction. The Settling  
4 Defendant shall provide the information required by Paragraph  
5 16.a as soon as practicable after the award of the contract and  
6 before the Waste Material is actually shipped.

7                           VII. ADDITIONAL RESPONSE ACTIONS

8           17. In the event that EPA determines or the Settling  
9 Defendant proposes that additional response actions are necessary  
10 to implement the Remedial Design approved by EPA pursuant to the  
11 AOC and the Consent Decree, or to meet the Performance Standards  
12 established under the ROD, the AOC, and the Consent Decree, or to  
13 execute contingency plans in order to carry out the approved  
14 Remedial Action, notification of such additional response actions  
15 shall be provided to the Project Coordinator for the other party.

16           18.a. Within ninety (90) days of receipt of notice from EPA  
17 or Settling Defendant pursuant to Paragraph 17 that additional  
18 response actions are necessary (or such longer time as may be  
19 specified by EPA), Settling Defendant shall submit for approval  
20 by EPA, after reasonable opportunity for review and comment by  
21 the State, a work plan for the additional response actions. The  
22 plan shall conform to the applicable requirements of the AOC for  
23 remedial design and Paragraphs 11, 12, and 13 of this Consent  
24 Decree, and may reference, as approved by EPA, applicable

1 portions of previously prepared documents which have been  
2 approved by EPA under the AOC or this Consent Decree. Upon  
3 approval of the plan pursuant to Section XII (Submissions  
4 Requiring Agency Approval), Settling Defendant shall implement  
5 the plan for additional response actions in accordance with the  
6 schedule contained therein.

7           b. Within ninety (90) days after EPA approves the  
8 sampling results for the Sitcum Phase 2 Area Sediment Sampling  
9 conducted under the OMM Plan, as the Phase 2 Area is identified  
10 in the AOC, if those results show that the Performance Standards  
11 have not been attained, Settling Defendant shall submit to EPA a  
12 plan for attaining the Performance Standards. Upon approval of  
13 the plan pursuant to Section XII (Submissions Requiring Agency  
14 Approval), Settling Defendant shall implement the plan for  
15 additional response actions in accordance with the schedule  
16 contained therein.

17           19. Any additional response actions that the Settling  
18 Defendant proposes are necessary to meet the requirements of the  
19 approved remedial design and the Performance Standards or to  
20 carry out the remedy selected in the ROD and approved under the  
21 AOC or this Consent Decree shall be subject to approval by EPA,  
22 after reasonable opportunity for review and comment by the State  
23 and the Natural Resource Trustees, and, if authorized by EPA,  
24 shall be completed by Settling Defendant in accordance with

1 plans, specifications, and schedules approved or established by  
2 EPA pursuant to Section XII (Submissions Requiring Agency  
3 Approval).

4 20. Settling Defendant may invoke the procedures set forth in  
5 Section XX (Dispute Resolution) to dispute EPA's determination  
6 that additional response actions are necessary to meet the  
7 Performance Standards or to carry out the remedy selected in the  
8 ROD and approved under the AOC or this Consent Decree. Such a  
9 dispute shall be resolved pursuant to Paragraphs 62-65 of this  
10 Consent Decree.

#### 11 VIII. EPA PERIODIC REVIEW

12 21. Settling Defendant shall conduct any studies and  
13 investigations as requested by EPA in order to permit EPA to  
14 conduct reviews at least every five (5) years as required by  
15 Section 121(c) of CERCLA and any applicable regulations.

16 22. If required by Sections 113(k)(2) or 117 of CERCLA,  
17 Settling Defendant and the public will be provided with an  
18 opportunity to comment on any further response actions proposed  
19 by EPA as a result of the review conducted pursuant to Section  
20 121(c) of CERCLA and to submit written comments for the record  
21 during the public comment period. After the period for  
22 submission of written comments is closed, the Regional  
23 Administrator, EPA Region 10, or his/her delegate will determine  
24 in writing whether further response actions are appropriate.



1 23. If the Regional Administrator, EPA Region 10, or his/her  
2 delegate determines that information received, in whole or in  
3 part, during the review conducted pursuant to Section 121(c) of  
4 CERCLA, indicates that the Remedial Action is not protective of  
5 human health and the environment, the Settling Defendant shall  
6 undertake any further response actions EPA has determined are  
7 appropriate, unless their liability for such further response  
8 actions is barred by the Covenant Not to Sue set forth in Section  
9 XXII. Settling Defendant shall submit a plan for such work to  
10 EPA for approval in accordance with the procedures set forth in  
11 Section VI (Performance of the Work by Settling Defendant) and  
12 shall implement the plan approved by EPA. The Settling Defendant  
13 may invoke the procedures set forth in Section XX (Dispute  
14 Resolution) to dispute (1) EPA's determination that the remedial  
15 action is not protective of human health and the environment, (2)  
16 EPA's selection of the further response actions ordered as  
17 arbitrary and capricious or otherwise not in accordance with law,  
18 or (3) EPA's determination that the Settling Defendant's  
19 liability for the further response actions requested is reserved  
20 in Paragraphs 79, 80, or 82 or otherwise not barred by the  
21 Covenant Not to Sue set forth in Section XXII.

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SITCUM WATERWAY  
CONSENT DECREE - PAGE 38

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1 IX. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

2 24. Settling Defendant shall use quality assurance, quality  
3 control, and chain of custody procedures as set forth in plans  
4 approved by EPA under the AOC.

5 25. Upon request, the Settling Defendant shall allow split or  
6 duplicate samples to be taken by EPA and the Natural Resource  
7 Trustees or their authorized representatives. Settling Defendant  
8 shall notify EPA and the Natural Resource Trustees not less than  
9 thirty (30) days in advance of any sample collection activity  
10 unless shorter notice is agreed to by EPA. Where determined  
11 feasible by EPA, EPA will notify Settling Defendant five (5) days  
12 in advance of any sample collection activity of its desire to  
13 split samples. In addition, EPA and the Natural Resource  
14 Trustees shall have the right to take any additional samples that  
15 EPA or the Natural Resource Trustees deem necessary. Upon  
16 request, EPA and the Natural Resource Trustees shall allow the  
17 Settling Defendant to take split or duplicate samples of any  
18 samples they take as part of the Plaintiffs' oversight of the  
19 Settling Defendant's implementation of the Work.

20 26. Settling Defendant shall submit to EPA four (4) copies of  
21 the results of all sampling and/or tests or other data obtained  
22 or generated by or on behalf of Settling Defendant with respect  
23 to the Sitcum Waterway Remediation Project and/or the  
24 implementation of this Consent Decree unless the Parties agree

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1 otherwise. Upon request, the United States or the Natural  
2 Resource Trustees will provide the Settling Defendant the results  
3 of all sampling and/or tests or other data obtained or generated  
4 pursuant to Paragraph 25.

5 27. Notwithstanding any provision of this Consent Decree, the  
6 United States and the Natural Resource Trustees hereby retain all  
7 information gathering and inspection authorities and rights,  
8 including enforcement actions related thereto, that they may have  
9 under CERCLA, CWA, RCRA, Chapter 70.105D RCW, and any other  
10 applicable statutes or regulations.

11 X. ACCESS

12 28. Commencing upon the effective date of this Consent  
13 Decree, the Settling Defendant agrees to provide the United  
14 States, the Natural Resource Trustees, and their representatives,  
15 including EPA and its contractors, access to the Sitcum Waterway  
16 Remediation Project area and any other property to which access  
17 is required for the implementation of this Consent Decree, to the  
18 extent access to the property is controlled by Settling  
19 Defendant, for the purposes of conducting any activity related to  
20 this Consent Decree including, but not limited to:

21 a. Monitoring the Work;

22 b. Verifying any data or information submitted to the  
23 United States;

1 c. Conducting investigations relating to contamination  
2 at or near the Sitcum Waterway Remediation Project;

3 d. Obtaining samples;

4 e. Assessing the need for, planning, or implementing  
5 additional response actions at or near the Sitcum Waterway  
6 Remediation Project area;

7 f. Inspecting and copying records, operating logs,  
8 contracts, or other documents maintained or generated by Settling  
9 Defendant or its agents, consistent with Section XXV; and

10 g. Assessing Settling Defendant's compliance with this  
11 Consent Decree.

12 Where determined feasible by EPA and the Natural Resource  
13 Trustees in their unreviewable discretion, EPA and the Natural  
14 Resource Trustees shall give notice prior to access and agree to  
15 abide by all health and safety requirements.

16 29. To the extent that the Sitcum Waterway Remediation  
17 Project or any other property to which access is required for the  
18 implementation of this Consent Decree is owned or controlled by  
19 persons other than Settling Defendant, Settling Defendant shall  
20 use best efforts to secure from such persons access for Settling  
21 Defendant, as well as for the United States, the State, and the  
22 Natural Resource Trustees and their representatives, including,  
23 but not limited to, their contractors, as necessary to effectuate  
24 this Consent Decree. For purposes of this Paragraph "best

1 | efforts" includes the payment of reasonable sums of money in  
2 | consideration of access. If any access required to complete the  
3 | Work is not obtained within forty-five (45) days of the effective  
4 | date of this Consent Decree, or within forty-five (45) days of  
5 | the date EPA notifies the Settling Defendant in writing that  
6 | additional access beyond that previously secured is necessary,  
7 | Settling Defendant shall promptly notify the United States, and  
8 | shall include in that notification a summary of the steps  
9 | Settling Defendant has taken to attempt to obtain access. The  
10 | United States or the Natural Resource Trustees may, as they deem  
11 | appropriate, assist Settling Defendant in obtaining access.  
12 | Settling Defendant shall reimburse the United States or the  
13 | Natural Resource Trustees, in accordance with the procedures in  
14 | Section XVII (Reimbursement of Response Costs), for all costs  
15 | incurred by the United States or the Natural Resource Trustees in  
16 | obtaining access.

17 | 30. Notwithstanding any provision of this Consent Decree, the  
18 | United States and the Natural Resource Trustees retain all access  
19 | authorities and rights, including enforcement authorities related  
20 | thereto, that they may have under CERCLA, CWA, RCRA and any other  
21 | applicable statute or regulations.

22 | XI. REPORTING REQUIREMENTS

23 | 31. In addition to any other requirement of this Consent  
24 | Decree, Settling Defendant shall submit to EPA and the State four

25 |  
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1 (4) copies of written monthly progress reports that: (a) describe  
2 the actions which have been taken toward achieving compliance  
3 with this Consent Decree during the previous month; (b) include a  
4 summary of all results of sampling and tests and all other data  
5 received or generated by Settling Defendant or their contractors  
6 or agents in the previous month; (c) identify all work plans,  
7 plans and other deliverables required by this Consent Decree  
8 completed and submitted during the previous month; (d) describe  
9 all actions, including, but not limited to, data collection and  
10 implementation of work plans, which are scheduled for the next  
11 six (6) weeks and provide other information relating to the  
12 progress of construction, including, but not limited to, critical  
13 path diagrams, Gantt charts and Pert charts; (e) include  
14 information regarding percentage of completion, unresolved delays  
15 encountered or anticipated that may affect the future schedule  
16 for implementation of the Work, and a description of efforts made  
17 to mitigate those delays or anticipated delays; (f) include any  
18 modifications to the work plans or other schedules that Settling  
19 Defendant has proposed to EPA or that have been approved by EPA;  
20 and (g) describe all activities undertaken in support of the  
21 Community Relations Plan during the previous month and those to  
22 be undertaken in the next six (6) weeks. Settling Defendant  
23 shall submit these progress reports to EPA and the State by the  
24 tenth (10th) day of every month following the effective date of

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1 this Consent Decree until EPA notifies the Settling Defendant  
2 pursuant to Paragraph 48.b of Section XV (Certification of  
3 Completion). EPA may direct Settling Defendant to reduce the  
4 frequency of these reports. If requested by EPA or the Natural  
5 Resource Trustees, Settling Defendant shall also provide  
6 briefings for EPA and the Natural Resource Trustees to discuss  
7 the progress of the Work.

8 32. The Settling Defendant shall notify EPA of any change in  
9 the schedule described in the monthly progress report for the  
10 performance of any activity, including, but not limited to, data  
11 collection and implementation of work plans, no later than seven  
12 days (7) prior to the performance of the activity.

13 33. Upon the occurrence of any event during performance of  
14 the Work that Settling Defendant is required to report pursuant  
15 to Section 103 of CERCLA or Section 304 of the Emergency Planning  
16 and Community Right-to-know Act (EPCRA), Settling Defendant shall  
17 within 24 hours of the onset of such event orally notify the EPA  
18 Project Coordinator or the Alternate EPA Project Coordinator (in  
19 the event of the unavailability of the EPA Project Coordinator),  
20 or, in the event that neither the EPA Project Coordinator or  
21 Alternate EPA Project Coordinator is available, the Emergency  
22 Response Section, Region 10, United States Environmental  
23 Protection Agency. These reporting requirements are in addition

1 to the reporting required by CERCLA Section 103 or EPCRA Section  
2 304.

3 34. Within twenty (20) days of the onset of such an event,  
4 Settling Defendant shall furnish to Plaintiffs a written report,  
5 signed by the Settling Defendant's Project Coordinator, setting  
6 forth the events which occurred and the measures taken, and to be  
7 taken, in response thereto. Within thirty (30) days of the  
8 conclusion of such an event, Settling Defendant shall submit a  
9 report setting forth all actions taken in response thereto.

10 35. Settling Defendant shall submit four (4) copies of all  
11 plans, reports, and data required by the AOC, the Remedial Design  
12 documents, the OMM Plan, the Consent Decree, or any other  
13 approved plans to EPA in accordance with the schedules set forth  
14 in such plans. Settling Defendant shall simultaneously submit  
15 one (1) copy of all such plans, reports and data to the State.

16 36. All reports and other documents submitted by Settling  
17 Defendant to EPA (other than the monthly progress reports  
18 referred to above) which purport to document Settling Defendant's  
19 compliance with the terms of this Consent Decree shall be signed  
20 by an authorized representative of the Settling Defendant.

21 XII. SUBMISSIONS REQUIRING AGENCY APPROVAL

22 37. Except for submittals under the AOC, after review of any  
23 plan, report or other item which is required to be submitted for  
24 approval pursuant to this Consent Decree, EPA, after reasonable  
25



1 opportunity for review and comment by the State and the Natural  
2 Resource Trustees, shall: (a) approve, in whole or in part, the  
3 submission; (b) approve the submission upon specified conditions;  
4 (c) modify the submission to cure the deficiencies; (d)  
5 disapprove, in whole or in part, the submission, directing that  
6 the Settling Defendant modify the submission; or (e) any  
7 combination of the above.

8 38. In the event of approval, approval upon conditions, or  
9 modification by EPA, pursuant to Paragraph 37(a), (b), or (c),  
10 Settling Defendant shall proceed to take any action required by  
11 the plan, report, or other item, as approved or modified by EPA  
12 subject only to their right to invoke the Dispute Resolution  
13 procedures set forth in Section XX (Dispute Resolution) with  
14 respect to the modifications or conditions made by EPA.

15 39. a. Upon receipt of a notice of disapproval pursuant to  
16 Paragraph 37(d), Settling Defendant shall, within thirty (30)  
17 days or such other time as specified by EPA in such notice,  
18 correct the deficiencies and resubmit the plan, report, or other  
19 item for approval. Any stipulated penalties applicable to the  
20 submission, as provided in Section XXI, shall accrue during the  
21 30-day period or otherwise specified period but shall not be  
22 payable unless the resubmission is disapproved or modified due to  
23 a material defect as provided in Paragraph 41.

1 b. Notwithstanding the receipt of a notice of disapproval  
2 pursuant to Paragraph 37(d), Settling Defendant shall proceed, at  
3 the direction of EPA, to take any action required by any non-  
4 deficient portion of the submission. Implementation of any non-  
5 deficient portion of a submission shall not relieve Settling  
6 Defendant of any liability for stipulated penalties under section  
7 XXI (Stipulated Penalties).

8 40. In the event that a resubmitted plan, report or other  
9 item, or portion thereof, is disapproved by EPA, EPA may again  
10 require the Settling Defendant to correct the deficiencies, in  
11 accordance with the preceding Paragraphs. EPA also retains the  
12 right to amend or develop the plan, report or other item.  
13 Settling Defendant shall implement any such plan, report, or item  
14 as amended or developed by EPA, subject only to its right to  
15 invoke the procedures set forth in Section XX (Dispute  
16 Resolution).

17 41. If upon resubmission, a plan, report, or item is  
18 disapproved or modified by EPA due to a material defect, Settling  
19 Defendant shall be deemed to have failed to submit such plan,  
20 report, or item timely and adequately unless the Settling  
21 Defendant invokes the dispute resolution procedures set forth in  
22 Section XX (Dispute Resolution) and EPA's action is overturned  
23 pursuant to that Section. The provisions of Section XX (Dispute  
24 Resolution) and Section XXI (Stipulated Penalties) shall govern

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1 the implementation of the Work and accrual and payment of any  
2 stipulated penalties during Dispute Resolution. If EPA's  
3 disapproval or modification is upheld, stipulated penalties shall  
4 accrue for such violation from the date on which the initial  
5 submission was originally required, as provided in Section XXI.

6 42. All plans, reports, and other items required to be  
7 submitted to EPA under this Consent Decree shall, upon approval  
8 or modification by EPA, be enforceable under this Consent Decree.  
9 In the event EPA approves or modifies a portion of a plan,  
10 report, or other item required to be submitted to EPA under this  
11 Consent Decree, the approved or modified portion shall be  
12 enforceable under this Consent Decree.

13 XIII. PROJECT COORDINATORS

14 43. Within twenty (20) days of the effective date of this  
15 Consent Decree, Settling Defendant and EPA will notify the other  
16 Parties, in writing, of the name, address and telephone number of  
17 their respective designated Project Coordinators and Alternate  
18 Project Coordinators. If a Project Coordinator or Alternate  
19 Project Coordinator initially designated is changed, the identity  
20 of the successor will be given to the other parties at least five  
21 (5) working days before the changes occur, unless impracticable,  
22 but in no event later than the actual day the change is made.  
23 The Settling Defendant's Project Coordinator shall be subject to  
24 disapproval by EPA and shall have the technical expertise

1 sufficient to adequately oversee all aspects of the Work. The  
2 Settling Defendant's Project Coordinator shall not be an attorney  
3 for the Settling Defendant. He or she may assign other  
4 representatives, including other contractors, to serve as a Site  
5 representative for oversight of performance of daily operations  
6 during remedial activities.

7 44. Plaintiffs may designate other representatives,  
8 including, but not limited to, EPA's and Natural Resource  
9 Trustees' employees, and federal and Natural Resource Trustees'  
10 contractors and consultants, to observe and monitor the progress  
11 of any activity undertaken pursuant to this Consent Decree.  
12 EPA's Project Coordinator and Alternate Project Coordinator shall  
13 have the authority lawfully vested in a Remedial Project Manager  
14 (RPM) and an On-Scene Coordinator (OSC) by the National  
15 Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project  
16 Coordinator or Alternate Project Coordinator shall have  
17 authority, consistent with the National Contingency Plan, to halt  
18 any Work required by this Consent Decree that is inconsistent  
19 with Work approved by EPA and to take any necessary response  
20 action when s/he determines that conditions at the Site  
21 constitute an emergency situation or may present an immediate  
22 threat to public health or welfare or the environment due to  
23 release or threatened release of Waste Material.

1                   XIV.   ASSURANCE OF ABILITY TO COMPLETE WORK

2           45.   Within thirty (30) days of entry of this Consent Decree,  
3   Settling Defendant shall establish and maintain financial  
4   security for performance of the Work in the amount of \$22,000,000  
5   by demonstrating that the Settling Defendant has:

6           (a) A current rating for its most recent bond issuance of  
7   no lower than BBB, as issued by Standard and Poor's, or Baa, as  
8   issued by Moody's; and

9           (b) Equity of at least six (6) times the amount of the  
10   performance of the Work that remains to be completed.

11          46.   To demonstrate the financial assurance for performance of  
12   the Work pursuant to Paragraph 45 of this Consent Decree,  
13   Settling Defendant shall submit to EPA a copy of an independent  
14   certified public accountant's report on examination of the  
15   Settling Defendant's most recent completed fiscal year.   Settling  
16   Defendant shall resubmit the information required by Paragraph 45  
17   annually, on the anniversary of the effective date of this  
18   Consent Decree.   In the event that EPA determines at any time  
19   that the financial assurances provided pursuant to this Section  
20   are inadequate, Settling Defendant shall, within thirty (30) days  
21   of receipt of notice of EPA's determination, obtain and present  
22   to EPA for approval one of the other forms of financial assurance  
23   listed in 40 CFR § 264.143.   Settling Defendant's inability to  
24   demonstrate financial ability to complete the Work shall not

1 | excuse performance of any activities required under this Consent  
2 | Decree.

3 |                   XV. CERTIFICATION OF COMPLETION

4 |         47. Completion of the Remedial Action

5 |             a. Within ninety (90) days after Settling Defendant  
6 | concludes that it has fully completed and attained Performance  
7 | Standards for the Remedial Action for: (1) the cleanup and  
8 | dredging of sediments in the Sitcum Waterway Problem Area; (2)  
9 | the dredging of sediments in the Blair Waterway; (3) the disposal  
10 | in the Milwaukee Waterway of sediments from both the Sitcum and  
11 | Blair Waterways; and (4) the habitat mitigation at and beyond the  
12 | mouth of the Milwaukee Waterway, Settling Defendant shall  
13 | schedule and conduct a pre-certification inspection to be  
14 | attended by Settling Defendant, EPA, and, at their option, the  
15 | Natural Resource Trustees. The pre-certification inspection  
16 | shall proceed without regard to any Additional Response Actions  
17 | for the Sitcum Phase 2 Area, pursuant to Paragraph 18.b. If,  
18 | after the pre-certification inspection, the Settling Defendant  
19 | still believes that these elements of the Remedial Action have  
20 | been fully performed and the Performance Standards have been  
21 | attained, it shall submit a written report requesting EPA  
22 | approval, pursuant to Section XII (Submissions Requiring Agency  
23 | Approval) within thirty (30) days of the inspection. In the  
24 | report, a registered professional engineer and the Settling

1 Defendant's Project Coordinator shall state that such elements of  
2 the Remedial Action have been completed in full satisfaction of  
3 the requirements of this Consent Decree. The written report  
4 shall include as-built drawings signed and stamped by a  
5 professional engineer. The written report shall also describe  
6 how the habitat mitigation components have satisfied each  
7 identified Performance Standard. The report shall contain the  
8 following statement, signed by an authorized official of the  
9 Settling Defendant or the Settling Defendant's Project  
10 Coordinator:

11 "To the best of my knowledge, after thorough investigation,  
12 I certify that the information contained in or accompanying  
13 this submission is true, accurate and complete. I am aware  
14 that there are significant penalties for submitting false  
information, including the possibility of fine and  
imprisonment for knowing violations."

15 If, after completion of the pre-certification inspection and  
16 receipt and review of the written report, EPA, after reasonable  
17 opportunity to review and comment by the State, determines that  
18 these elements of the Remedial Action or any portion thereof has  
19 not been completed in accordance with this Consent Decree or that  
20 the Performance Standards have not been achieved, EPA will notify  
21 Settling Defendant in writing of the activities that must be  
22 undertaken to complete these elements of the Remedial Action and  
23 achieve the Performance Standards. EPA will set forth in the  
24 notice a schedule for performance of such activities consistent  
25 with the Consent Decree, including Remedial Design documents

1 approved by EPA under the AOC or require the Settling Defendant  
2 to submit a schedule to EPA for approval pursuant to Section XII  
3 (Submissions Requiring Agency Approval). Settling Defendant  
4 shall perform all activities described in the notice in  
5 accordance with the specifications and schedules established  
6 pursuant to this Paragraph, subject to their right to invoke the  
7 dispute resolution procedures set forth in Section XX (Dispute  
8 Resolution).

9           b. Within ninety (90) days after Settling Defendant  
10 concludes that the Remedial Action, including the Additional  
11 Mitigation Project, has been fully performed and the Performance  
12 Standards have been attained, Settling Defendant shall schedule  
13 and conduct a pre-certification inspection to be attended by  
14 Settling Defendant, EPA, and, at their option, the Natural  
15 Resource Trustees. If, after the pre-certification inspection,  
16 the Settling Defendant still believes that the Remedial Action  
17 has been fully performed and the Performance Standards have been  
18 attained, it shall submit a written report requesting  
19 certification to EPA for approval, pursuant to Section XII  
20 (Submissions Requiring Agency Approval) within thirty (30) days  
21 of the inspection. In the report, a registered professional  
22 engineer and the Settling Defendant's Project Coordinator shall  
23 state that the Remedial Action has been completed in full  
24 satisfaction of the requirements of this Consent Decree. The

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1 written report shall include as-built drawings signed and stamped  
2 by a professional engineer; the report may refer to, but need not  
3 include, drawings already submitted pursuant to Paragraph 46.a.  
4 The written report shall also describe how the habitat mitigation  
5 components have satisfied each identified Performance Standard.  
6 The report shall contain the following statement, signed by an  
7 authorized official of the Settling Defendant or the Settling  
8 Defendant's Project Coordinator:

9 "To the best of my knowledge, after thorough investigation,  
10 I certify that the information contained in or accompanying  
11 this submission is true, accurate and complete. I am aware  
12 that there are significant penalties for submitting false  
information, including the possibility of fine and  
imprisonment for knowing violations."

13 If, after completion of the pre-certification inspection and  
14 receipt and review of the written report, EPA, after reasonable  
15 opportunity to review and comment by the State, determines that  
16 the Remedial Action or any portion thereof has not been completed  
17 in accordance with this Consent Decree or that the Performance  
18 Standards have not been achieved, EPA will notify Settling  
19 Defendant in writing of the activities that must be undertaken to  
20 complete the Remedial Action and achieve the Performance  
21 Standards. EPA will set forth in the notice a schedule for  
22 performance of such activities consistent with the Consent Decree  
23 and Remedial Design documents approved by EPA under the AOC or  
24 require the Settling Defendant to submit a schedule to EPA for  
25 approval pursuant to Section XII (Submissions Requiring Agency

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1 Approval). Settling Defendant shall perform all activities  
2 described in the notice in accordance with the specifications and  
3 schedules established pursuant to this Paragraph, subject to  
4 their right to invoke the dispute resolution procedures set forth  
5 in Section XX (Dispute Resolution).

6 c. Within ninety (90) days after Settling Defendant  
7 concludes that the Remedial Action, including any Additional  
8 Response Actions under Section VII, has been fully performed and  
9 the Performance Standards have been attained, Settling Defendant  
10 shall schedule and conduct a pre-certification inspection to be  
11 attended by Settling Defendant, EPA, and, at their option, the  
12 Natural Resource Trustees. If, after the pre-certification  
13 inspection, the Settling Defendant still believes that the  
14 Remedial Action has been fully performed and the Performance  
15 Standards have been attained, it shall submit a written report  
16 requesting certification to EPA for approval, pursuant to Section  
17 XII (Submissions Requiring Agency Approval) within thirty (30)  
18 days of the inspection. In the report, a registered professional  
19 engineer and the Settling Defendant's Project Coordinator shall  
20 state that the Remedial Action has been completed in full  
21 satisfaction of the requirements of this Consent Decree. The  
22 written report shall include as-built drawings signed and stamped  
23 by a professional engineer; the report may refer to, but need not  
24 include, drawings already submitted pursuant to Paragraph 46.a.

1 The written report shall also describe how the habitat mitigation  
2 components have satisfied each identified Performance Standard.  
3 The report shall contain the following statement, signed by an  
4 authorized official of the Settling Defendant or the Settling  
5 Defendant's Project Coordinator:

6 "To the best of my knowledge, after thorough investigation,  
7 I certify that the information contained in or accompanying  
8 this submission is true, accurate and complete. I am aware  
9 that there are significant penalties for submitting false  
10 information, including the possibility of fine and  
11 imprisonment for knowing violations."

12 If, after completion of the pre-certification inspection and  
13 receipt and review of the written report, EPA, after reasonable  
14 opportunity to review and comment by the State, determines that  
15 the Remedial Action or any portion thereof has not been completed  
16 in accordance with this Consent Decree or that the Performance  
17 Standards have not been achieved, EPA will notify Settling  
18 Defendant in writing of the activities that must be undertaken to  
19 complete the Remedial Action and achieve the Performance  
20 Standards. EPA will set forth in the notice a schedule for  
21 performance of such activities consistent with the Consent Decree  
22 and Remedial Design documents approved by EPA under the AOC or  
23 require the Settling Defendant to submit a schedule to EPA for  
24 approval pursuant to Section XII (Submissions Requiring Agency  
25 Approval). Settling Defendant shall perform all activities  
26 described in the notice in accordance with the specifications and  
27 schedules established pursuant to this Paragraph, subject to

1 | their right to invoke the dispute resolution procedures set forth  
2 | in Section XX (Dispute Resolution).

3 |         d. If EPA concludes, based on the initial or any  
4 | subsequent report requesting Certification of Completion, and  
5 | after a reasonable opportunity for review and comment by the  
6 | State, that the Remedial Action has been fully performed in  
7 | accordance with this Consent Decree and that the Performance  
8 | Standards have been achieved, EPA will so certify in writing to  
9 | Settling Defendant. This certification shall constitute the  
10 | Certification of Completion of the Remedial Action for purposes  
11 | of this Consent Decree, including, but not limited to, Section  
12 | XXII (Covenants Not to Sue by Plaintiffs). Certification of  
13 | Completion of the Remedial Action shall not affect Settling  
14 | Defendant's obligations under this Consent Decree.

15 |         48. Completion of the Work

16 |         a. Within ninety (90) days after Settling Defendant  
17 | concludes that all phases of the Work (including activities under  
18 | the OMM Plan), have been fully performed, Settling Defendant  
19 | shall schedule and conduct a pre-certification inspection to be  
20 | attended by Settling Defendant and EPA. If, after the pre-  
21 | certification inspection, the Settling Defendant still believes  
22 | that the Work has been fully performed, Settling Defendant shall  
23 | submit a written report by a registered professional engineer  
24 | stating that the Work has been completed in full satisfaction of

1 the requirements of this Consent Decree. The report shall  
2 contain the following statement, signed by an authorized official  
3 of the Settling Defendant or the Settling Defendant's Project  
4 Coordinator:

5 "To the best of my knowledge, after thorough investigation,  
6 I certify that the information contained in or accompanying  
7 this submission is true, accurate and complete. I am aware  
8 that there are significant penalties for submitting false  
9 information, including the possibility of fine and  
10 imprisonment for knowing violations."

11 If, after review of the written report, EPA, after reasonable  
12 opportunity for review and comment by the State, determines that  
13 any portion of the Work has not been completed in accordance with  
14 this Consent Decree, EPA will notify Settling Defendant in  
15 writing of the activities that must be undertaken to complete the  
16 Work. EPA will set forth in the notice a schedule for  
17 performance of such activities consistent with the Consent Decree  
18 and Remedial Design documents approved by EPA under the AOC or  
19 require the Settling Defendant to submit a schedule to EPA for  
20 approval pursuant to Section XII (Submissions Requiring Agency  
21 Approval). Settling Defendant shall perform all activities  
22 described in the notice in accordance with the specifications and  
23 schedules established therein, subject to their right to invoke  
24 the dispute resolution procedures set forth in Section XX  
25 (Dispute Resolution).

26 b. If EPA concludes, based on the initial or any  
27 subsequent request for Certification of Completion by Settling

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1 Defendant, and after reasonable opportunity for review and  
2 comment by the State, that the Work has been fully performed in  
3 accordance with this Consent Decree, EPA will so notify the  
4 Settling Defendant in writing.

5 XVI. EMERGENCY RESPONSE

6 49. In the event of any action or occurrence during the  
7 performance of the Work which causes or threatens a release of  
8 Waste Material from the Sitcum Waterway Remediation Project that  
9 constitutes an emergency situation or may present an immediate  
10 threat to public health or welfare or the environment, Settling  
11 Defendant shall, subject to Paragraph 50, immediately take all  
12 appropriate action to prevent, abate, or minimize such release or  
13 threat of release, and shall immediately notify the EPA's Project  
14 Coordinator, or, if the Project Coordinator is unavailable, EPA's  
15 Alternate Project Coordinator. If neither of these persons is  
16 available, the Settling Defendant shall notify the EPA Superfund  
17 Response/Investigations Branch, Region 10. Settling Defendant  
18 shall take such actions in consultation with EPA's Project  
19 Coordinator or other available authorized EPA officer and in  
20 accordance with all applicable provisions of the Health and  
21 Safety Plans, the Contingency Plans, and any other applicable  
22 plans or documents developed pursuant to the AOC. In the event  
23 that Settling Defendant fails to take appropriate response action  
24 as required by this Section, and EPA takes such action instead,

1 Settling Defendant shall reimburse EPA all costs of the response  
2 action not inconsistent with the NCP pursuant to Section XVII  
3 (Reimbursement of Response Costs).

4 50. Nothing in the preceding Paragraph or in this Consent  
5 Decree shall be deemed to limit any authority of the United  
6 States, or the State, to take, direct, or order all appropriate  
7 action or to seek an order from the Court to protect human health  
8 and the environment or to prevent, abate, respond to, or minimize  
9 an actual or threatened release of Waste Material on, at, or from  
10 the Site.

11 XVII. REIMBURSEMENT OF RESPONSE COSTS AND  
12 SETTLEMENT OF NATURAL RESOURCE DAMAGE CLAIMS

13 51. a. Response Costs.

14 Within thirty (30) days of the effective date of this  
15 Consent Decree, Settling Defendant shall pay to the United States  
16 \$1,136,638.18 in reimbursement of EPA's Past Response Costs. The  
17 payments shall be made by Electronic Funds Transfer ("EFT" or  
18 wire transfer) to the United States Department of Justice lockbox  
19 bank, referencing DOJ Case No. 90-11-3-711, and U.S.A.O. file  
20 number 9301795, and EPA Region and Site/Spill ID #10G7 in  
21 reimbursement of EPA's Past Response Costs. Payment shall be  
22 made in accordance with instructions provided by the United  
23 States to the Settling Defendant upon execution of this Consent  
24 Decree by the United States. Payments by EFT must be received at

1 the U.S. D.O.J. lockbox bank by 4:00 p.m. (Eastern Time) to be  
2 credited on that day.

3 b. Natural Resource Damages.

4 i. Within thirty (30) days of the effective date of this  
5 Consent Decree, Settling Defendant shall pay to the Natural  
6 Resource Trustees the sum of \$335,000.00 in reimbursement of Past  
7 Trustee Assessment Costs. Payments to each of the Natural  
8 Resource Trustees shall be made in the amounts and with payees  
9 and addressed as follows:

10 Payee: National Oceanic and Atmospheric Administration

11 Amount: \$157,003.53

12 Address: Manager  
13 NOS/Damage Assessment Center  
6001 Executive Blvd., Rm. 425  
Rockville, MD 20852

14 Payee: Puyallup Tribe of Indians

15 Amount: \$84,588.00

16 Address: Mr. Richard Du Bey  
17 Stoel Rives Boley Jones & Grey  
3600 One Union Square  
18 600 University Street  
Seattle, WA 98101

19 Payee: Muckleshoot Indian Tribe

20 Amount: \$28,542.47

21 Address: Mr. Rob Otsea  
22 Reservation Attorney  
Muckleshoot Indian Tribe  
23 39015 172nd Avenue Southeast  
Auburn, WA 98002

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1 Payee: State of Washington/Dept. of Ecology

2 Amount: \$23,000.00

3 Address: State of Washington  
4 Department of Ecology  
5 Attention: Cashiering Section  
6 P.O. Box 5128  
7 Lacey, WA 98503-0210

8 Payee: Secretary of the Interior

9 Amount: \$41,866.00

10 Address: Kate Benkert  
11 U.S. Fish and Wildlife Service  
12 3704 Griffen Lane S.E., Suite 102  
13 Olympia, WA 98501-2192

14 ii. Settling Defendant shall pay to the Natural Resource  
15 Trustees \$12,000,000 (twelve million dollars) in settlement of  
16 Natural Resource Damages caused by releases of hazardous  
17 substances from property owned, managed or operated by Settling  
18 Defendant within the Commencement Bay Environment. Payments  
19 shall be made in accordance with the attached Order directing the  
20 deposit of Natural Resource Damages into the Registry of the  
21 Court and in compliance with the following schedule:

	<u>Date:</u>	<u>Amount:</u>
19	11/15/93	\$ 800,000
20	11/15/94	\$1,000,000
	11/15/95	\$ 800,000
21	5/15/96	\$ 500,000
	11/15/96	\$ 500,000
22	5/15/97	\$1,000,000
	11/15/97	\$1,000,000
23	5/15/98	\$1,400,000
	11/15/98	\$1,400,000
24	5/15/99	\$1,900,000
	11/15/99	\$1,700,000

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26 Thomas W. Swegle  
27 WA Bar Number 15667  
28 U.S. Department of Justice  
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1 The Natural Resource Trustees and Settling Defendant intend that  
2 all funds paid for Natural Resource Damages be used to benefit  
3 the natural resources of Commencement Bay in Pierce County  
4 injured as a result of releases of hazardous substances. The  
5 Natural Resource Trustees and Settling Defendant also recognize  
6 that the maximum benefit of habitat restoration in Commencement  
7 Bay can best be achieved with prompt resolution of all claims for  
8 Natural Resource Damages by the Natural Resource Trustees against  
9 responsible parties. Accordingly, the Natural Resource Trustees  
10 and Settling Defendant agree that the Natural Resource Trustees  
11 may apply up to \$1,950,000 (one million nine hundred fifty  
12 thousand dollars) of the funds paid as Natural Resource Damages  
13 to pay Future Trustee Assessment Costs as follows: (a) up to  
14 \$150,000 (one hundred fifty thousand dollars) of that sum for  
15 Future Trustee Assessment Costs incurred in connection with the  
16 Sitcum Waterway Remediation Project; (b) up to \$800,000 (eight  
17 hundred thousand dollars) of that sum for the costs of assessing  
18 Natural Resource Damages in the Commencement Bay Environment; and  
19 (c) up to an additional \$1,000,000 (one million dollars) of that  
20 sum for the costs of assessing Natural Resource Damages in the  
21 Commencement Bay Environment subsequent to January 1, 1995, if  
22 the Natural Resource Trustees are unable, after good faith  
23 efforts, to obtain adequate funds to cover such costs from other  
24 potentially responsible parties. The Natural Resource Trustees

1 agree to credit Settling Defendant the amount of \$35,555.56  
2 (thirty-five thousand five hundred fifty-five dollars and fifty-  
3 six cents) against the payment due November 15, 1999, to reflect  
4 payments made by Settling Defendant toward the costs of the  
5 natural resource damage assessment pursuant to the Funding and  
6 Participation Agreement for Phase 1 of the Commencement Bay  
7 Natural Resource Damage Assessment.

8           iii. Settling Defendant shall impose institutional con-  
9 trols on the "Wasser & Winters Property" (identified in Appendix  
10 E) to establish:

11                   (1) a permanent Buffer Area (as defined in Appendix  
12 E) in which the Settling Defendant shall refrain from conducting  
13 any development activities, except remedial activities under  
14 CERCLA, MTCA, or otherwise required under applicable law; and

15                   (2) a permanent Disturbance Barrier, which shall be  
16 an eight-foot cedar fence constructed along the "Disturbance  
17 Barrier Line" (as shown on Appendix E), or such other Disturbance  
18 Barrier agreed upon by the Settling Defendant and the Natural  
19 Resource Trustees that meets the objectives set forth in this  
20 Subparagraph. The purpose of the permanent Buffer Area and the  
21 permanent Disturbance Barrier is to minimize sound, light, visual  
22 and physical disturbances within the Buffer Area and upon the  
23 habitat and wildlife in the Hylebos Creek area.

1           iv. Settling Defendant agrees to provide the Natural  
2 Resource Trustees and their representatives, including their  
3 contractors, access to the Buffer Area on the "Wasser & Winters  
4 Property" to monitor the area and undertake such restoration ac-  
5 tivities as may enhance the habitat value of the Buffer Area.  
6 The Natural Resource Trustees and their representatives shall  
7 give reasonable notice prior to access. Settling Defendant  
8 agrees to provide the Natural Resource Trustees with applicable  
9 health and safety plans. The Natural Resource Trustees agree to  
10 abide by such health and safety requirements. In addition, the  
11 Natural Resource Trustees and the Settling Defendant agree to  
12 conduct their activities in the Buffer Area in a manner designed  
13 to minimize interference with the Settling Defendant's  
14 obligations under this Consent Decree or any other applicable  
15 law. The Natural Resource Trustees agree to notify Settling  
16 Defendant prior to conducting any restoration activities in the  
17 Buffer Area.

18           v. The Natural Resource Trustees agree to require that  
19 any contractor who performs work for them in the Buffer Area  
20 shall agree to indemnify and save the Settling Defendant harmless  
21 against all claims of any nature, including, but not limited to,  
22 claims by third parties for death, personal injury, or property  
23 damage, and claims for environmental liability that arises as the  
24 result of negligent acts or omissions of such contractors, its

1 employees and agents, while they are present on the Buffer Area.  
2 Such indemnity shall be limited to actual damages only, and shall  
3 not extend to consequential damages or any other liability.

4 vi. To minimize the impact upon the natural environment,  
5 drainage on the "Wasser & Winters Property" shall be discharged  
6 at a point no closer to the mouth of Hylebos Creek than the  
7 discharge point shown on Appendix E.

8 vii. Settling Defendant shall continue to remain liable  
9 for the cleanup and/or remediation of any hazardous substances,  
10 including all known or subsequently discovered hazardous  
11 substances, that remain on, in, under or about the "Wasser &  
12 Winters Property" and the Option Area on the "East West Road  
13 Property" (as defined in Appendix F) as of the effective date of  
14 the Consent Decree ("Historic Contamination"). Settling  
15 Defendant shall be liable for all monitoring, testing or other  
16 ongoing or future requirements regarding Historic Contamination  
17 on, in, under or about the "Wasser & Winters Property" and the  
18 Option Area on the "East West Road Property" that either have  
19 been, or may in the future be, imposed by this Consent Decree or  
20 other lawful means. To the extent permitted by law, Settling  
21 Defendant shall hold the Natural Resource Trustees harmless and  
22 shall indemnify and defend the Natural Resource Trustees against  
23 any claim that may be asserted by any person against the Natural  
24 Resource Trustees due to the presence of hazardous substances on,

1 in, under or about the "Wasser & Winters Property" and the Option  
2 Area on the "East West Road Property." If by intent of Settling  
3 Defendant or by operation of law any property interest is trans-  
4 ferred to the Natural Resource Trustees pursuant to this Consent  
5 Decree, such transfer shall not create liability for future  
6 cleanup, remediation and/or natural resource damages due to the  
7 presence of Historic Contamination that remains on, in, under or  
8 about the "Wasser & Winters Property" and the Option Area on the  
9 "East West Road Property" as of the date that such interest is  
10 transferred.

11 viii. Settling Defendant and the Natural Resource  
12 Trustees have entered into an Option Agreement to Buy Real  
13 Property, attached and made a part hereof as Appendix F. The  
14 Settling Defendant and Natural Resource Trustees agree to be  
15 bound by the terms of said Agreement. Settling Defendant agrees  
16 to grant the Natural Resource Trustees a right of first refusal  
17 with regard to the Option Area, defined in Appendix F. Such  
18 right of first refusal shall commence at the end of the first  
19 five-year term of the Option Agreement and continue for five  
20 years thereafter; provided, however, that such right of first  
21 refusal shall terminate upon exercising of the Option. This  
22 right of first refusal shall be exercised within ten (10) days of  
23 the communication of an offer to purchase the Option Area to the  
24 Lead Trustee.

1 ix. The obligations of Settling Defendant with regard to  
2 the implementation of the institutional controls on the "Wasser &  
3 Winters Property," including the right of access described above,  
4 and on the "East West Road Property" (identified in Appendix F)  
5 shall be binding upon the Settling Defendant and any and all  
6 persons who subsequently acquire any interest in such property.  
7 Within fifteen (15) days after entry of this Consent Decree,  
8 Settling Defendant shall record at the Registry of Deeds a notice  
9 of institutional controls on each property, which shall be  
10 reviewed and concurred in by the Lead Trustee prior to recording.

11 52. Settling Defendant shall reimburse the United States for  
12 all Future Response Costs in connection with the Sitcum Waterway  
13 Remediation Project not inconsistent with the National  
14 Contingency Plan incurred by the United States that are not  
15 reimbursed as Future Trustee Assessment Costs pursuant to  
16 Paragraph 51.b.ii. The United States will send the Settling  
17 Defendant a bill requiring payment that includes a prepared cost  
18 summary, which includes direct and indirect costs incurred by EPA  
19 and DOJ, and their contractors, on an annual basis. Settling  
20 Defendant shall make all payments within sixty (60) days of  
21 Settling Defendant's receipt of each bill requiring payment,  
22 except as otherwise provided in Paragraph 53. Settling Defendant  
23 shall make all payments required by this Paragraph in the form of  
24 a certified check(s) made payable to "EPA Hazardous Substances  
25

1 Superfund" and referencing the U.S.A.O. file number 9301795,  
2 the EPA Region and Site/Spill ID #10G7, and DOJ case number 90-  
3 11-3-711. Settling Defendant shall forward the certified  
4 check(s) to the U.S. EPA Superfund, P.O. Box 360903M, Pittsburgh,  
5 Pennsylvania 15251, and shall send copies of the check(s) to the  
6 Director of the Hazardous Waste Division, EPA, Region 10, the EPA  
7 RPM, and the EPA Hearing Clerk, Office of Regional Counsel, EPA,  
8 Region 10, and to the U.S. Department of Justice as specified in  
9 Section XXVII (Notice and Submissions).

10 53. Settling Defendant may contest payment of any Future  
11 Response Costs under Paragraph 52 if they determine that the  
12 United States has made an accounting error or if it alleges that  
13 a cost item that is included represents costs that are  
14 inconsistent with the NCP. Such objection shall be made in  
15 writing within thirty (30) days of receipt of the bill and must  
16 be sent to the United States (if the United States accounting is  
17 being disputed) pursuant to Section XXVII (Notices and  
18 Submissions). Any such objection shall specifically identify the  
19 contested Future Response Costs and the basis for objection. In  
20 the event of an objection, the Settling Defendant shall within  
21 the thirty (30) day period pay all uncontested Future Response  
22 Costs to the United States in the manner described in Paragraph  
23 52. Simultaneously, the Settling Defendant shall establish an  
24 interest bearing escrow account in a federally-insured bank duly

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1 chartered in the State of Washington and remit to that escrow  
2 account funds equivalent to the amount of the contested Future  
3 Response Costs. The Settling Defendant shall send to the United  
4 States, as provided in Section XXVII (Notices and Submissions), a  
5 copy of the transmittal letter and check paying the uncontested  
6 Future Response Costs, and a copy of the correspondence that  
7 establishes and funds the escrow account, including, but not  
8 limited to, information containing the identity of the bank and  
9 bank account under which the escrow account is established as  
10 well as a bank statement showing the initial balance of the  
11 escrow account. Simultaneously with establishment of the escrow  
12 account, the Settling Defendant shall initiate the Dispute  
13 Resolution procedures in Section XX (Dispute Resolution). If the  
14 United States prevails in the dispute, within five (5) days of  
15 the resolution of the dispute, the Settling Defendant shall pay  
16 the sums due (with accrued interest) to the United States, in the  
17 manner described in Paragraph 52. If the Settling Defendant  
18 prevails concerning any aspect of the contested costs, the  
19 Settling Defendant shall pay that portion of the costs (plus  
20 associated accrued interest) for which it did not prevail to the  
21 United States, in the manner described in Paragraph 52; Settling  
22 Defendant shall be disbursed any balance of the escrow account.  
23 The dispute resolution procedures set forth in this Paragraph in  
24 conjunction with the procedures set forth in Section XX (Dispute

1 Resolution) shall be the exclusive mechanisms for resolving  
2 disputes regarding the Settling Defendant's obligation to  
3 reimburse the United States for its Future Response Costs.

4 54. In the event that the payments required by Paragraphs  
5 51.a. and 51.b.i. are not made within thirty (30) days of the  
6 effective date of this Consent Decree or the payments required by  
7 Paragraph 52 are not made within sixty (60) days of the Settling  
8 Defendant's receipt of the bill, Settling Defendant shall pay  
9 interest on the unpaid balance at the rate established pursuant  
10 to Section 107(a) of CERCLA, 42 U.S.C. § 9607. The interest to  
11 be paid on Past Response Costs shall begin to accrue on the  
12 thirty-first (31st) day after the effective date of this Consent  
13 Decree. The interest on Future Response Costs shall begin to  
14 accrue on the sixty-first (61st) day after the date of the  
15 Settling Defendant's receipt of the bill. Interest shall accrue  
16 at the rate specified through the date of the Settling  
17 Defendant's payment. Payments of interest made under this  
18 Paragraph shall be in addition to such other remedies or  
19 sanctions available to Plaintiffs by virtue of Settling  
20 Defendant's failure to make timely payments under this Section.

21 XVIII. INDEMNIFICATION AND INSURANCE

22 55. The United States and the Natural Resource Trustees do  
23 not assume any liability by entering into this agreement or by  
24 virtue of any designation of Settling Defendant as EPA's

1 authorized representatives under Section 104(e) of CERCLA.  
2 Settling Defendant shall indemnify, save and hold harmless the  
3 United States, the Natural Resource Trustees, and their  
4 officials, agents, employees, contractors, subcontractors, or  
5 representatives for or from any and all claims or causes of  
6 action arising from, or on account of, acts or omissions of  
7 Settling Defendant, its officers, directors, employees, agents,  
8 contractors, subcontractors, and any persons acting on their  
9 behalf or under their control, in carrying out activities  
10 pursuant to this Consent Decree, including, but not limited to,  
11 any claims arising from any designation of Settling Defendant as  
12 EPA's authorized representative under Section 104(e) of CERCLA.  
13 Further, the Settling Defendant agrees to pay the United States  
14 and the Natural Resource Trustees all costs they incur including,  
15 but not limited to, attorneys fees and other expenses of  
16 litigation and settlement arising from, or on account of, claims  
17 made against the United States or the Natural Resource Trustees  
18 based on acts or omissions of Settling Defendant, its officers,  
19 directors, employees, agents, contractors, subcontractors, and  
20 any persons acting on its behalf or under its control, in  
21 carrying out activities pursuant to this Consent Decree. Neither  
22 the United States nor the Natural Resource Trustees shall be held  
23 out as a party to any contract entered into by or on behalf of  
24 Settling Defendant in carrying out activities pursuant to this

1 Consent Decree. Neither the Settling Defendant nor any such  
2 contractor shall be considered an agent of the United States or  
3 the Natural Resource Trustees.

4 56. Settling Defendant waives all claims against the United  
5 States and the Natural Resource Trustees for reimbursement or for  
6 set-off of any payments made or to be made to the United States  
7 or the Natural Resource Trustees for damages or to the United  
8 States or the Natural Resource Trustees arising from or on  
9 account of any contract, agreement, or arrangement between  
10 Settling Defendant and any person for performance of Work on or  
11 relating to the Site, including, but not limited to, claims on  
12 account of construction delays. In addition, Settling Defendant  
13 shall indemnify and hold harmless the United States and the  
14 Natural Resource Trustees with respect to any and all claims for  
15 damages or reimbursement arising from or on account of any  
16 contract, agreement, or arrangement between Settling Defendant  
17 and any person for performance of Work on or relating to the  
18 Sitcum Waterway Remediation Project, including, but not limited  
19 to, claims on account of construction delays.

20 57. No later than fifteen (15) days before commencing any on-  
21 site Work, Settling Defendant shall secure, and shall maintain  
22 until the first anniversary of EPA's Certification of Completion  
23 of the Remedial Action pursuant to Paragraph 47.d. of Section XV  
24 (Certification of Completion) comprehensive general liability

1 insurance and automobile insurance with limits of ten million  
2 dollars, combined single limit naming as additional insured the  
3 United States and the Natural Resource Trustees. In addition,  
4 for the duration of this Consent Decree, Settling Defendant shall  
5 satisfy, or shall ensure that its contractors or subcontractors  
6 satisfy, all applicable laws and regulations regarding the  
7 provision of worker's compensation insurance for all persons  
8 performing the Work on behalf of Settling Defendant in  
9 furtherance of this Consent Decree. Prior to commencement of the  
10 Work under this Consent Decree, Settling Defendant shall provide  
11 to EPA and the Natural Resource Trustees certificates of such  
12 insurance and a copy of each insurance policy. Settling  
13 Defendant shall resubmit such certificates and copies of policies  
14 each year on the anniversary of the effective date of this  
15 Consent Decree. If Settling Defendant demonstrates by evidence  
16 satisfactory to EPA and the Natural Resource Trustees that any  
17 contractor or subcontractor maintains insurance equivalent to  
18 that described above, or insurance covering the same risks but in  
19 a lesser amount, then, with respect to that contractor or  
20 subcontractor, the Settling Defendant need provide only that  
21 portion of the insurance described above which is not maintained  
22 by the contractor or subcontractor.





1 is necessary to complete those obligations. An extension of the  
2 time for performance of the obligations affected by the force  
3 majeure event shall not, of itself, extend the time for  
4 performance of any other obligation. If EPA does not agree that  
5 the delay or anticipated delay has been or will be caused by a  
6 force majeure event, EPA will notify the Settling Defendant in  
7 writing of its decision. If EPA agrees that the delay is  
8 attributable to a force majeure event, EPA will notify the  
9 Settling Defendant in writing of the length of the extension, if  
10 any, for performance of the obligations affected by the force  
11 majeure event.

12 61. If the Settling Defendant elects to invoke the dispute  
13 resolution procedures set forth in Section XX (Dispute  
14 Resolution), it shall do so no later than fifteen (15) days after  
15 receipt of EPA's notice. In any such proceeding, Settling  
16 Defendant shall have the burden of demonstrating by a  
17 preponderance of the evidence that the delay or anticipated delay  
18 has been or will be caused by a force majeure event, that the  
19 duration of the delay or the extension sought was or will be  
20 warranted under the circumstances, that best efforts were  
21 exercised to avoid and mitigate the effects of the delay, and  
22 that the Settling Defendant complied with the requirements of  
23 Paragraphs 58 and 59, above. If the Settling Defendant carries  
24 this burden, the delay at issue shall be deemed not to be a

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1 violation by the Settling Defendant of the affected obligation of  
2 this Consent Decree identified to EPA and the Court.

3 XX. DISPUTE RESOLUTION

4 62. Unless otherwise expressly provided for in this Consent  
5 Decree, the dispute resolution procedures of this Section shall  
6 be the exclusive mechanism to resolve disputes arising under or  
7 with respect to this Consent Decree. However, the procedures set  
8 forth in this Section shall not apply to actions by the United  
9 States to enforce obligations of the Settling Defendant that have  
10 not been disputed in accordance with this Section.

11 63. Any dispute which arises under or with respect to this  
12 Consent Decree shall be resolved as follows: If the Settling  
13 Defendant objects to any EPA notice or EPA action made pursuant  
14 to this Consent Decree, Settling Defendant shall send the EPA  
15 Project Coordinator a written Notice of Dispute within fifteen  
16 (15) days after EPA's action or after receiving EPA's notice.  
17 The dispute in the first instance shall be the subject of  
18 informal negotiations between the parties to the dispute. The  
19 period for informal negotiations shall not exceed twenty (20)  
20 days from the time the Notice of Dispute is received by the  
21 Project Coordinator, unless the parties to the dispute agree in  
22 writing to an alternative period.

23 64. a. In the event that the parties cannot resolve a  
24 dispute by informal negotiations under the preceding Paragraph,

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1 then the position advanced by EPA shall be considered binding  
2 unless, within ten (10) days after the conclusion of the informal  
3 negotiation period, Settling Defendant invokes the formal dispute  
4 resolution procedures of this Section by serving on the United  
5 States a written Statement of Position on the matter in dispute,  
6 including, but not limited to, any factual data, analysis or  
7 opinion supporting that position and any supporting documentation  
8 relied upon by the Settling Defendant. The Statement of Position  
9 shall specify the Settling Defendant's position as to whether  
10 formal dispute resolution should proceed under Paragraph 65 or  
11 66.

12 b. Within fourteen (14) days after receipt of Settling  
13 Defendant's Statement of Position, EPA will serve on Settling  
14 Defendant its Statement of Position, including, but not limited  
15 to, any factual data, analysis, or opinion supporting that  
16 position and all supporting documentation relied upon by EPA.  
17 EPA's Statement of Position shall include a statement as to  
18 whether formal dispute resolution should proceed under Paragraph  
19 65 or 66.

20 c. If there is disagreement between EPA and the Settling  
21 Defendant as to whether dispute resolution should proceed under  
22 Paragraph 65 or 66, the parties to the dispute shall follow the  
23 procedures set forth in the paragraph determined by EPA to be  
24 applicable. However, if the Settling Defendant ultimately

1 | appeals to the court to resolve the dispute, the Court shall  
2 | determine which paragraph is applicable in accordance with the  
3 | standards of applicability set forth in Paragraphs 65 or 66.

4 |       65. Formal dispute resolution for disputes pertaining to the  
5 | selection or adequacy of any response action and all other  
6 | disputes that are accorded review on the administrative record  
7 | under applicable principles of administrative law shall be  
8 | conducted pursuant to the procedures set forth in this Paragraph.  
9 | For purposes of this Paragraph, the adequacy of any response  
10 | action includes, without limitation: (1) the adequacy or  
11 | appropriateness of plans, procedures to implement plans, or any  
12 | other items requiring approval by EPA under this Consent Decree;  
13 | and (2) the adequacy of the performance of response actions taken  
14 | pursuant to this Consent Decree. Nothing in this Consent Decree  
15 | shall be construed to allow any dispute by Settling Defendant  
16 | regarding the validity of the ROD's provisions.

17 |       a. An administrative record of the dispute shall be  
18 | maintained by EPA and shall contain all statements of position,  
19 | including supporting documentation, submitted pursuant to this  
20 | Paragraph. Where appropriate, EPA may allow submission of  
21 | supplemental statements of position by the parties to the  
22 | dispute.

23 |       b. The Director of the Hazardous Waste Division, EPA  
24 | Region 10, will issue a final administrative decision resolving

1 the dispute based on the administrative record described in  
2 Paragraph 65.a. This decision shall be binding upon the Settling  
3 Defendant, subject only to the right to seek judicial review  
4 pursuant to Paragraphs 65.c. and d.

5 c. Any administrative decision made by EPA pursuant to  
6 Paragraph 65.b. shall be reviewable by this Court, provided that  
7 a notice of judicial appeal is filed by the Settling Defendant  
8 with the Court and served on all Parties within ten (10) days of  
9 receipt of EPA's decision. The notice of judicial appeal shall  
10 include a description of the matter in dispute, the efforts made  
11 by the parties to resolve it, the relief requested, and the  
12 schedule, if any, within which the dispute must be resolved to  
13 ensure orderly implementation of this Consent Decree. The United  
14 States may file a response to Settling Defendant's notice of  
15 judicial appeal.

16 d. In proceedings on any dispute governed by this  
17 Paragraph, the Settling Defendant shall have the burden of  
18 demonstrating that the decision of the Hazardous Waste Division  
19 Director is arbitrary and capricious or otherwise not in  
20 accordance with law. Judicial review of EPA's decision shall be  
21 on the administrative record compiled pursuant to Paragraph 65.a.

22 66. Formal dispute resolution for disputes that neither  
23 pertain to the selection or adequacy of any response action nor  
24 are otherwise accorded review on the administrative record under

1 applicable principles of administrative law, shall be governed by  
2 this Paragraph.

3 a. Following receipt of Settling Defendant's Statement  
4 of Position submitted pursuant to Paragraph 64, the Director of  
5 the Hazardous Waste Division, EPA Region 10, will issue a final  
6 decision resolving the dispute. The Hazardous Waste Division  
7 Director's decision shall be binding on the Settling Defendant  
8 unless, within ten (10) days of receipt of the decision, the  
9 Settling Defendant files with the Court and serves on the parties  
10 a notice of judicial appeal setting forth the matter in dispute,  
11 the efforts made by the parties to resolve it, the relief  
12 requested, and the schedule, if any, within which the dispute  
13 must be resolved to ensure orderly implementation of the Consent  
14 Decree. The United States may file a response to Settling  
15 Defendant's notice of judicial appeal.

16 b. Notwithstanding Paragraph R of Section I  
17 (Background) of this Consent Decree, judicial review of any  
18 dispute governed by this Paragraph shall be governed by  
19 applicable provisions of law.

20 67. The invocation of formal dispute resolution procedures  
21 under this Section shall not extend, postpone or affect in any  
22 way any obligation of the Settling Defendant under this Consent  
23 Decree not directly in dispute, unless EPA or the Court agrees  
24 otherwise. Stipulated penalties with respect to the disputed  
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1 matter shall continue to accrue but payment shall be stayed  
2 pending resolution of the dispute as provided in Paragraph 76.  
3 Notwithstanding the stay of payment, stipulated penalties shall  
4 accrue from the first day of noncompliance with any applicable  
5 provision of this Consent Decree. In the event that the Settling  
6 Defendant does not prevail on the disputed issue, stipulated  
7 penalties shall be assessed and paid as provided in Section XXI  
8 (Stipulated Penalties).

9 XXI. STIPULATED PENALTIES

10 68. The Settling Defendant shall be liable for stipulated  
11 penalties in the amounts set forth in Paragraphs 69 and 70 to the  
12 United States for failure to comply with the requirements of this  
13 Consent Decree, unless excused under Section XIX (Force Majeure).  
14 "Compliance" by Settling Defendant shall include completion of  
15 the activities under this Consent Decree or any work plan or  
16 other plan approved under this Consent Decree identified below in  
17 accordance with all applicable requirements of law, this Consent  
18 Decree, remedial design documents approved by EPA pursuant to the  
19 AOC, and any plans or other documents approved by EPA pursuant to  
20 this Consent Decree and within the specified time schedules  
21 established by and approved under this Consent Decree.

22 69. The following stipulated penalties shall be payable per  
23 violation per day to the United States for any noncompliance that  
24 is not governed by Paragraph 70:

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1	<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
2	<u>Per Day</u>	
3	\$1,500	1st through 30th day
4	\$6,000	31st through 60th day
5	\$15,000	61st day and beyond

6 70. The following stipulated penalties shall be payable per  
7 violation per day to the United States for failure to submit  
8 timely or adequate reports or other written documents:

9	<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
10	<u>Per Day</u>	
11	\$500	1st through 30th day
12	\$1,000	31st through 60th day
13	\$2,500	61st day and beyond

14 71. In the event that EPA assumes performance of a portion or  
15 all of the Work pursuant to Paragraph 83 of Section XXII  
16 (Covenants Not to Sue by Plaintiffs), Settling Defendant shall be  
17 liable for a stipulated penalty in the amount of \$250,000.

18 72. All penalties shall begin to accrue on the day after the  
19 complete performance is due or other failure or refusal to comply  
20 occurs, and shall continue to accrue through the final day of the  
21 noncompliance, except that, for any violation pursuant to  
22 Paragraph 37 arising out of EPA's disapproval of timely  
23 submittals of deliverables pursuant to the AOC or the Consent  
24 Decree, penalties shall begin to accrue on the due date of such  
25 submittals and shall continue to accrue for thirty (30) days, at  
26 which point penalties shall stop accruing until EPA notifies  
27 Settling Defendant of the violation, whereupon accrual of

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1 penalties shall resume. With respect to all other violations,  
2 penalties shall accrue from the date of violation regardless of  
3 whether the United States has notified Settling Defendant of a  
4 violation. All penalties shall continue to accrue through the  
5 final day of the correction of the noncompliance or completion of  
6 the activity. Nothing herein shall prevent the simultaneous  
7 accrual of separate penalties for separate violations of this  
8 Consent Decree.

9 73. Following EPA's determination that the Settling Defendant  
10 has failed to comply with a requirement of this Consent Decree,  
11 EPA may give the Settling Defendant written notification of the  
12 same and describe the noncompliance. EPA may send the Settling  
13 Defendant a written demand for the payment of the penalties.  
14 However, penalties shall accrue as provided in the preceding  
15 Paragraph regardless of whether EPA has notified the Settling  
16 Defendant of a violation.

17 74. All penalties owed to the United States under this  
18 section shall be due and payable within sixty (60) days of the  
19 Settling Defendant's receipt from EPA of a demand for payment of  
20 the penalties, unless Settling Defendant invokes the Dispute  
21 Resolution procedures under Section XX (Dispute Resolution). The  
22 payments shall be made by Electronic Funds Transfer ("EFT" or  
23 wire transfer) to the United States Department of Justice lockbox

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1 bank, referencing DOJ Case No. 90-11-3-711, and U.S.A.O. file  
2 number 9301795, and EPA Region and Site/Spill ID #10G7.  
3 Payment shall be made in accordance with instructions provided by  
4 the United States to the Settling Defendant upon execution of the  
5 consent decree. Any EFTs received at the U.S. D.O.J. lockbox  
6 bank after 4:00 p.m. (Eastern Time) will be credited on the next  
7 business day.

8 75. The payment of penalties shall not alter in any way  
9 Settling Defendant's obligation to complete the performance of  
10 the Work required under this Consent Decree.

11 76. Penalties shall continue to accrue as provided in  
12 Paragraph 72 during any dispute resolution period, but need not  
13 be paid until the following:

14 a. If the dispute is resolved by agreement or by a  
15 decision of EPA that is not appealed to this Court, accrued  
16 penalties determined to be owing shall be paid to EPA within  
17 sixty (60) days of the agreement or the receipt of EPA's decision  
18 or order;

19 b. If the dispute is appealed to this Court and the  
20 United States prevails in whole or in part, the Settling  
21 Defendant shall pay all accrued penalties determined by the Court  
22 to be owed to EPA within sixty (60) days of receipt of the  
23 Court's decision or order, except as provided in Subparagraph c  
24 below;

1 c. If the District Court's decision is appealed by any  
2 Party, Settling Defendant shall pay all accrued penalties  
3 determined by the District Court to be owing to the United States  
4 into an interest-bearing escrow account within sixty (60) days of  
5 receipt of the Court's decision or order. Penalties shall be  
6 paid into this account as they continue to accrue, at least every  
7 sixty (60) days. Within fifteen (15) days of receipt of the  
8 final appellate court decision, the escrow agent shall pay the  
9 balance of the account to EPA or to Settling Defendant to the  
10 extent that they prevail.

11 77. a. If Settling Defendant fails to pay stipulated  
12 penalties when due, the United States may institute proceedings  
13 to collect the penalties, as well as interest. Settling  
14 Defendant shall pay interest on the unpaid balance, which shall  
15 begin to accrue on the date of demand made pursuant to Paragraph  
16 74 at the rate established pursuant to Section 107(a) of CERCLA,  
17 42 U.S.C. § 9607.

18 b. Nothing in this Consent Decree shall be construed as  
19 prohibiting, altering, or in any way limiting the ability of the  
20 United States to seek any other remedies or sanctions available  
21 by virtue of Settling Defendant's violation of this Decree or of  
22 the statutes and regulations upon which it is based, including,  
23 but not limited to, penalties pursuant to Section 122(1) of  
24 CERCLA.

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1                   XXII. COVENANTS NOT TO SUE BY PLAINTIFFS

2           78. a. In consideration of the actions that will be performed  
3 and the payments that will be made by the Settling Defendant  
4 under the terms of the Consent Decree, and except as specifically  
5 provided in Paragraphs 79, 80, and 82 of this Section, the United  
6 States on behalf of EPA covenants not to sue or to take  
7 administrative action against Settling Defendant pursuant to  
8 Sections 106 and 107(a) of CERCLA relating to the Sitcum Waterway  
9 Problem Area, the Milwaukee Waterway, and the Blair Waterway, and  
10 for recovery of Past Response Costs incurred prior to the  
11 effective date of this Consent Decree. These covenants not to  
12 sue shall take effect upon the receipt by EPA of the payments  
13 required by Paragraph 51.a. of Section XVII (Reimbursement of  
14 Response Costs and Settlement of Natural Resource Damage Claims).  
15 These covenants not to sue are conditioned upon the complete and  
16 satisfactory performance by Settling Defendant of its obligations  
17 under this Consent Decree. These covenants not to sue extend  
18 only to the Settling Defendant and do not extend to any other  
19 person.

20           b. In consideration of the actions that will be  
21 performed and the payments that will be made by the Settling  
22 Defendant under the terms of this Consent Decree, the United  
23 States, on behalf of the federal Natural Resource Trustees, and  
24 the other Natural Resource Trustees on their own behalf, covenant

1 not to sue in this action or in a new action against Settling  
2 Defendant, pursuant to CERCLA or Chapter 70.105D RCW for recovery  
3 of Past Trustee Assessment Costs, Future Trustee Assessment  
4 Costs, and the Settling Defendant's liability for Natural  
5 Resource Damages caused by releases of hazardous substances from  
6 property owned, managed or operated by Settling Defendant within  
7 the Commencement Bay Environment incurred prior to the effective  
8 date of this Consent Decree. These covenants not to sue shall  
9 take effect upon the receipt by the Natural Resource Trustees of  
10 the payments required by Paragraph 51.b.i. of Section XVII  
11 (Reimbursement of Response Costs and Settlement of Natural  
12 Resource Damage Claims). These covenants not to sue are  
13 conditioned upon the complete and satisfactory performance by  
14 Settling Defendant of its obligations under this Consent Decree.  
15 These covenants not to sue extend only to the Settling Defendant  
16 and do not extend to any other person.

17 79. Pre-certification reservations. Notwithstanding any  
18 other provision of this Consent Decree, the United States and the  
19 Natural Resource Trustees reserve, and this Consent Decree is  
20 without prejudice to, the right to institute proceedings in this  
21 action or in a new action, or to issue an administrative order  
22 seeking to compel Settling Defendant (1) to perform further  
23 response actions relating to the Site if, prior to certification  
24 of completion of the Remedial Action:

1 (i) conditions at the Sitcum waterway Problem Area, the  
2 Milwaukee Waterway, or the Blair Waterway,  
3 previously unknown to Plaintiffs, are discovered, or  
4 (ii) information, previously unknown to Plaintiffs, is  
5 received, in whole or in part; or  
6 (2) to reimburse the United States or the Natural Resource  
7 Trustees for additional costs of response or for natural resource  
8 damages if, prior to certification of completion of the Remedial  
9 Action, conditions or information in the Commencement Bay  
10 Environment, previously unknown to Plaintiffs, are discovered;  
11 and these previously unknown conditions or information referred  
12 to in (i) and (ii) above together with any other relevant  
13 information indicates that the Remedial Action is not protective  
14 of human health or the environment, or that there is injury to,  
15 destruction of, or loss of natural resources of a type unknown,  
16 or of a magnitude greater than was known, at the time of entry of  
17 this Consent Decree.

18 80. Post-certification reservations. Notwithstanding any  
19 other provision of this Consent Decree, the United States and the  
20 Natural Resource Trustees reserve, and this Consent Decree is  
21 without prejudice to, the right to institute proceedings in this  
22 action or in a new action, or to issue an administrative order  
23 seeking to compel Settling Defendant (1) to perform further  
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1 response actions relating to the Site if, subsequent to  
2 certification of completion of the Remedial Action:

- 3 (i) conditions at the Sitcum Waterway Problem Area, the  
4 Milwaukee Waterway, or the Blair Waterway,  
5 previously unknown to Plaintiffs, are discovered, or  
6 (ii) information, previously unknown to Plaintiffs, is  
7 received, in whole or in part; or

8 (2) to reimburse the United States or the Natural Resource  
9 Trustees for additional costs of response or for natural resource  
10 damages if, subsequent to certification of completion of the  
11 Remedial Action, conditions or information in the Commencement  
12 Bay Environment, previously unknown to the Plaintiffs, are  
13 discovered; and these previously unknown conditions or  
14 information referred to in (i) and (ii) above together with any  
15 other relevant information indicates that the Remedial Action is  
16 not protective of human health or the environment, or that there  
17 is injury to, destruction of, or loss of natural resources of a  
18 type unknown, or of a magnitude greater than was known, at the  
19 time of certification of completion of the Remedial Action.

20 81. For purposes of Paragraph 79, the information and the  
21 conditions known to Plaintiffs shall include only that  
22 information and those conditions set forth in the Record of  
23 Decision for the Site, the administrative record supporting the  
24 Record of Decision, and in information received and approved by

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1 EPA pursuant to the AOC. For purposes of Paragraph 80, the  
2 information and the conditions known to Plaintiffs shall include  
3 only that information and those conditions set forth in the  
4 Record of Decision, the administrative record supporting the  
5 Record of Decision, and any information received and approved by  
6 EPA pursuant to the requirements of the AOC and this Consent  
7 Decree prior to Certification of Completion of the Remedial  
8 Action. As regards Natural Resource Damages, for purposes of  
9 Paragraphs 79 and 80, the injury to, destruction of, or loss of  
10 natural resources known shall include those addressed by the  
11 Preassessment Screen issued by the Natural Resource Trustees on  
12 or about October 29, 1991.

13 82. General reservations of rights. The covenants not to sue  
14 set forth above do not pertain to any matters other than those  
15 expressly specified in Paragraph 78. The United States and the  
16 Natural Resource Trustees reserve, and this Consent Decree is  
17 without prejudice to, all rights against Settling Defendant with  
18 respect to all other matters, including but not limited to, the  
19 following:

20 (1) claims based on a failure by Settling Defendant  
21 to meet a requirement of this Consent Decree;

22 (2) liability arising from the past, present, or future  
23 disposal, release, or threat of release of Waste Materials  
24 outside of the Sitcum Waterway Remediation Project area;

1 (3) liability for response costs and damages for injury  
2 to, destruction of, or loss of natural resources other than  
3 that caused by releases of hazardous substances from property  
4 owned, managed or operated by Settling Defendant within the  
5 Commencement Bay Environment;

6 (4) criminal liability;

7 (5) liability for violations of federal, tribal, or  
8 state law which occur during or after implementation of the  
9 Remedial Action; and

10 (7) liability for additional operable units and problem  
11 areas at the Site or the final response action, or for EPA  
12 response costs, other than Past Response Costs, that are not  
13 reimbursed under the AOC or this Consent Decree.

14 83. In the event EPA determines that the Settling Defendant  
15 has failed to implement any provisions of the Work in an adequate  
16 or timely manner, EPA may perform any and all portions of the  
17 Work as EPA determines necessary. Settling Defendant may invoke  
18 the procedures set forth in Section XX (Dispute Resolution) to  
19 dispute EPA's determination that the Settling Defendant failed to  
20 implement a provision of the Work in an adequate or timely manner  
21 as arbitrary and capricious or otherwise not in accordance with  
22 law. Such dispute shall be resolved on the administrative  
23 record. Costs incurred by the United States in performing the  
24 Work pursuant to this Paragraph shall be considered Future



1 Response Costs that Settling Defendant shall pay pursuant to  
2 Section XVII (Reimbursement of Response Costs).

3 84. Notwithstanding any other provision of this Consent  
4 Decree, the United States and the Natural Resource Trustees  
5 retain all authority and reserve all rights to take any and all  
6 response actions authorized by law.

7 XXIII. COVENANTS BY SETTLING DEFENDANT

8 85. Settling Defendant hereby covenants not to sue and agrees  
9 not to assert any claims or causes of action against the United  
10 States or the Natural Resource Trustees with respect to the  
11 Sitcum Waterway Remediation Project or this Consent Decree,  
12 including, but not limited to, any direct or indirect claim for  
13 reimbursement from the Hazardous Substance Superfund (established  
14 pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through  
15 CERCLA Sections 106(b)(2), 111, 112, 113 or any other provision  
16 of law, any claim against the United States and the Natural  
17 Resource Trustees, including any department, agency or  
18 instrumentality of the United States under CERCLA Sections 107 or  
19 113 related to the Sitcum Waterway Remediation Project, or  
20 arising in respect to Natural Resource Damages caused by releases  
21 of hazardous substances from property owned, managed or operated  
22 by Settling Defendant within the Commencement Bay Environment, or  
23 any claims arising out of response activities at the Sitcum  
24 Waterway Remediation Project. However, the Settling Defendant

1 reserves, and this Consent Decree is without prejudice to,  
2 actions against the United States based on negligent actions  
3 taken directly by the United States (not including oversight or  
4 approval of the Settling Defendant plans or activities) that are  
5 brought pursuant to any statute other than CERCLA and for which  
6 the waiver of sovereign immunity is found in a statute other than  
7 CERCLA. Nothing in this Consent Decree shall be deemed to  
8 constitute preauthorization of a claim within the meaning of  
9 Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.  
10 § 300.700(d).

11 XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

12 86. Nothing in this Consent Decree shall be construed to  
13 create any rights in, or grant any cause of action to, any person  
14 not a party to this Consent Decree. The preceding sentence shall  
15 not be construed to waive or nullify any rights that any person  
16 not a signatory to this decree may have under applicable law.  
17 Each of the Parties expressly reserves any and all rights  
18 (including the right to contribution protection), defenses,  
19 claims, demands, and causes of action which each party may have  
20 with respect to any matter, transaction, or occurrence relating  
21 in any way to the Site against any person not a party hereto.

22 87. With regard to claims for contribution against Settling  
23 Defendant for matters addressed in this Consent Decree, the  
24 Parties hereto agree that the Settling Defendant is entitled to

1 such protection from contribution actions or claims as is  
2 provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

3 88. The Settling Defendant has reviewed the information and  
4 data generated with regard to sources of hazardous substances in  
5 the Sitcum Waterway and has concluded that the costs of seeking  
6 reimbursement for Settling Defendant's costs of remediation from  
7 other parties would not be cost effective and could delay the  
8 Remedial Action pursuant to this Consent Decree. Therefore,  
9 Settling Defendant agrees not to bring any claim for contribution  
10 against any party for those portions of the Work related to the  
11 Remedial Action for the Phase 1 Area identified in the  
12 Administrative Order on Consent (attached as Appendix B to this  
13 Consent Decree). Settling Defendant reserves all rights to bring  
14 claims for contribution against any person with respect to all  
15 other matters, including, but not limited to: (1) any Additional  
16 Response Actions pursuant to Paragraph 18; and (2) Natural  
17 Resource Damages, including Past Trustee Assessment Costs, Future  
18 Trustee Assessment Costs, and payments made pursuant to Paragraph  
19 51.b.ii. The Settling Defendant agrees that with respect to any  
20 suit or claim for contribution brought by it for matters related  
21 to this Consent Decree it will notify the United States and other  
22 Natural Resource Trustees in writing no later than sixty (60)  
23 days prior to the initiation of such suit or claim.

1 89. The Settling Defendant also agrees that with respect to  
2 any suit or claim for contribution brought against it for matters  
3 related to this Consent Decree it will notify in writing the  
4 United States and other Natural Resource Trustees within 10 days  
5 of service of the complaint on it. In addition, Settling  
6 Defendant shall notify the United States and other Natural  
7 Resource Trustees within ten (10) days of service or receipt of  
8 any Motion for Summary Judgment and within 10 days of receipt of  
9 any order from a court setting a case for trial.

10 90. In any subsequent administrative or judicial proceeding  
11 initiated by the United States or the other Natural Resource  
12 Trustees for injunctive relief, recovery of response costs,  
13 natural resource damages, or other appropriate relief relating to  
14 the Site, Settling Defendant shall not assert, and may not  
15 maintain, any defense or claim based upon the principles of  
16 waiver, res judicata, collateral estoppel, issue preclusion,  
17 claim-splitting, or other defenses based upon any contention that  
18 the claims raised by the United States and the other Natural  
19 Resource Trustees in the subsequent proceeding were or should  
20 have been brought in the instant case; provided, however, that  
21 nothing in this Paragraph affects the enforceability of the  
22 covenants not to sue set forth in Section XXII (Covenants Not to  
23 Sue by Plaintiffs).

1 XXV. ACCESS TO INFORMATION

2 91. Settling Defendant shall provide to EPA and the Lead  
3 Natural Resource Trustee, upon request, copies of all documents  
4 and information within their possession or control or that of  
5 their contractors or agents relating to activities at the Sitcum  
6 Waterway Remediation Project or to the implementation of this  
7 Consent Decree, including, but not limited to, sampling,  
8 analysis, chain of custody records, manifests, trucking logs,  
9 receipts, reports, sample traffic routing, correspondence, or  
10 other documents or information related to the Work. Settling  
11 Defendant shall also make available to EPA and the Lead Natural  
12 Resource Trustee, for purposes of investigation, information  
13 gathering, or testimony, its employees, agents, or  
14 representatives with knowledge of relevant facts concerning the  
15 performance of the Work.

16 92. a. Settling Defendant may assert business  
17 confidentiality claims covering part or all of the documents or  
18 information submitted to Plaintiffs under this Consent Decree to  
19 the extent permitted by and in accordance with Section 104(e)(7)  
20 of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b).  
21 Documents or information determined to be confidential by EPA  
22 will be afforded the protection specified in 40 C.F.R. Part 2,  
23 Subpart B. If no claim of confidentiality accompanies documents  
24 or information when they are submitted to EPA or the Lead Natural

1 Resource Trustee, or if EPA has notified Settling Defendant that  
2 the documents or information are not confidential under the  
3 standards of Section 104(e)(7) of CERCLA, the public may be given  
4 access to such documents or information without further notice to  
5 Settling Defendant.

6 b. The Settling Defendant may assert that certain documents,  
7 records and other information are privileged under the attorney-  
8 client privilege or any other privilege recognized by federal  
9 law. If the Settling Defendant asserts such a privilege in lieu  
10 of providing documents, it shall provide the Plaintiffs with the  
11 following: (1) the title of the document, record, or  
12 information; (2) the date of the document, record, or  
13 information; (3) the name and title of the author of the  
14 document, record, or information; (4) the name and title of each  
15 addressee and recipient; (5) a description of the contents of the  
16 document, record, or information: and (6) the privilege asserted  
17 by Settling Defendant. However, no documents, reports or other  
18 information created or generated pursuant to the requirements of  
19 the Consent Decree shall be withheld on the grounds that they are  
20 privileged.

21 93. No claim of confidentiality shall be made with respect to  
22 any data, including, but not limited to, all sampling,  
23 analytical, monitoring, hydrogeologic, scientific, chemical, or  
24 engineering data, or any other documents or information

1 evidencing conditions at or around the Sitcum Waterway  
2 Remediation Project.

3 XXVI. RETENTION OF RECORDS

4 94. Until ten (10) years after the Settling Defendant's  
5 receipt of EPA's notification pursuant to Paragraph 48.b of  
6 Section XV (Certification of Completion of the Work), Settling  
7 Defendant shall preserve and retain all records and documents now  
8 in its possession or control or which come into its possession or  
9 control that relate in any manner to the performance of the Work  
10 or liability of any person for response actions conducted and to  
11 be conducted at the Sitcum Waterway Remediation Project,  
12 regardless of any corporate retention policy to the contrary.  
13 Until ten (10) years after the Settling Defendant's receipt of  
14 EPA's notification pursuant to Paragraph 48.b of Section XV  
15 (Certification of Completion), Settling Defendant shall also  
16 instruct its contractors and agents to preserve all documents,  
17 records, and information of whatever kind, nature or description  
18 relating to the performance of the Work.

19 95. At the conclusion of this document retention period,  
20 Settling Defendant shall notify the United States at least ninety  
21 (90) days prior to the destruction of any such records or  
22 documents, and, upon request by the United States, Settling  
23 Defendant shall deliver any such records or documents to EPA.  
24 The Settling Defendant may assert that certain documents, records

1 and other information are privileged under the attorney-client  
2 privilege or any other privilege recognized by federal law. If  
3 the Settling Defendant asserts such a privilege, it shall provide  
4 the Plaintiffs with the following: (1) the title of the  
5 document, record, or information; (2) the date of the document,  
6 record, or information; (3) the name and title of the author of  
7 the document, record, or information; (4) the name and title of  
8 each addressee and recipient; (5) a description of the subject of  
9 the document, record, or information: and (6) the privilege  
10 asserted by Settling Defendant. However, no documents, reports  
11 or other information created or generated pursuant to the  
12 requirements of the Consent Decree shall be withheld on the  
13 grounds that they are privileged.

14 96. Settling Defendant hereby certifies, individually, that  
15 it has not altered, mutilated, discarded, destroyed or otherwise  
16 disposed of any records, documents or other information relating  
17 to its potential liability regarding the Sitcum Waterway  
18 Remediation Project since notification of potential liability by  
19 the United States or the State or the filing of suit against it  
20 regarding the Sitcum Waterway Remediation Project and that it has  
21 fully complied with any and all EPA requests for information  
22 pursuant to Section 104(e) and 122(e) of CERCLA and Section 3007  
23 of RCRA.



1 XXVII. NOTICES AND SUBMISSIONS

2 97. Whenever, under the terms of this Consent Decree, written  
3 notice is required to be given or a report or other document is  
4 required to be sent by one party to another, it shall be directed  
5 to the individuals at the addresses specified below, unless those  
6 individuals or their successors give notice of a change to the  
7 other parties in writing. Whenever, under the terms of this  
8 Consent Decree, the Settling Defendant is required to give notice  
9 to the United States and/or EPA or to submit a document to the  
10 United States and/or EPA, the Settling Defendant shall also give  
11 notice or submit such document to the Lead Natural Resource  
12 Trustee. All notices and submissions shall be considered  
13 effective upon receipt, unless otherwise provided. Written  
14 notice as specified herein shall constitute complete satisfaction  
15 of any written notice requirement of the Consent Decree with  
16 respect to the United States, EPA, the Natural Resource Trustees,  
17 and the Settling Defendant, respectively.

18 As to the United States:

19 Chief, Environmental Enforcement Section  
20 Environment and Natural Resources Division  
21 U.S. Department of Justice  
22 P.O. Box 7611  
23 Ben Franklin Station  
24 Washington, D.C. 20044  
25 Re: DJ # 90-11-3-711

26 and

27 Thomas W. Swegle  
28 WA Bar Number 15667  
U.S. Department of Justice  
Envt. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3143

1 Director, Hazardous Waste Division  
United States Environmental Protection Agency  
2 Region 10  
1200 Sixth Avenue  
3 Seattle, Washington 98101

4 As to EPA:

5 Margaret Justus  
EPA Project Coordinator  
6 United States Environmental Protection Agency  
Region 10  
7 1200 Sixth Avenue  
Seattle, Washington 98101

8 As to the Settling Defendant:

9 Dick Gilmur  
10 Port of Tacoma's Project Coordinator  
Port of Tacoma  
11 P.O. Box 1837  
Tacoma, Washington 98401-1837

12 As to the Lead Natural Resource Trustee:

13 Robert A. Taylor  
14 National Oceanic and Atmospheric Administration  
Damage Assessment and Restoration Center  
15 7600 Sand Point Way NW, BIN C15700  
Seattle, Washington 98115

16 As to the State:

17 Fred Gardner  
18 Department of Ecology - Rowsix  
Box 47600  
19 Olympia, Washington 98504-7600

20 XXVIII. EFFECTIVE DATE

21 98. The effective date of this Consent Decree shall be the  
22 date upon which this Consent Decree is entered by the Court,  
23 except as otherwise provided herein.

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1 Appendix E - Wasser & Winters Property

2 Appendix F - Option to Buy Real Property

3  
4 XXXI. COMMUNITY RELATIONS

5 101. Settling Defendant shall propose to EPA its  
6 participation in the community relations plan to be developed by  
7 EPA. EPA will determine the appropriate role for the Settling  
8 Defendant under the Plan. Settling Defendant shall also  
9 cooperate with EPA in providing information regarding the Work to  
10 the public. As requested by EPA or the Lead Natural Resource  
11 Trustee, Settling Defendant shall participate in the preparation  
12 of such information for dissemination to the public and in public  
13 meetings which may be held or sponsored by EPA or the Natural  
14 Resource Trustees to explain activities at or relating to the  
15 site.

16 XXXII. MODIFICATION

17 102. Schedules or remedial design plans specified in this  
18 Consent Decree or approved under the AOC for completion of the  
19 Work may be modified by agreement of EPA and the Settling  
20 Defendant. All such modifications shall be made in writing.

21 103. Nothing in this Decree shall be deemed to alter the  
22 Court's power to enforce, supervise or approve modifications to  
23 this Consent Decree.  
24

1           XXXIII.   LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

2           104.   This Consent Decree shall be lodged with the Court for a  
3 period of not less than thirty (30) days for public notice and  
4 comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C.  
5 § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves  
6 the right to withdraw or withhold its consent if the comments  
7 regarding the Consent Decree disclose facts or considerations  
8 which indicate that the Consent Decree is inappropriate,  
9 improper, or inadequate. Settling Defendant consents to the  
10 entry of this Consent Decree without further notice.

11          105.   If for any reason the Court should decline to approve  
12 this Consent Decree in the form presented, this agreement is  
13 voidable at the sole discretion of any party and the terms of the  
14 agreement may not be used as evidence in any litigation between  
15 the Parties.

16                           XXXIV.   SIGNATORIES/SERVICE

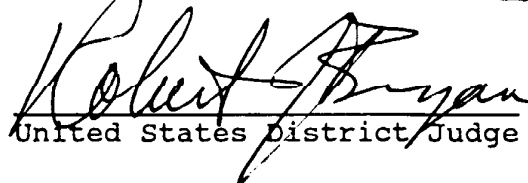
17          106.   The undersigned representative of Settling Defendant to  
18 this Consent Decree, the Assistant Attorney General for  
19 Environment and Natural Resources of the Department of Justice,  
20 and the undersigned representative for each of the other Natural  
21 Resource Trustees certifies that he or she is fully authorized to  
22 enter into the terms and conditions of this Consent Decree and to  
23 execute and legally bind such party to this document.

1 107. The Settling Defendant hereby agrees not to oppose entry  
2 of this Consent Decree by this Court or to challenge any  
3 provision of this Consent Decree unless the United States has  
4 notified the Settling Defendant in writing that it no longer  
5 supports entry of the Consent Decree.

6 108. The Settling Defendant shall identify, on the attached  
7 signature page, the name, address and telephone number of an  
8 agent who is authorized to accept service of process by mail on  
9 behalf of that party with respect to all matters arising under or  
10 relating to this Consent Decree. Settling Defendant hereby  
11 agrees to accept service in that manner and to waive the formal  
12 service requirements set forth in Rule 4 of the Federal Rules of  
13 Civil Procedure and any applicable local rules of this Court,  
14 including, but not limited to, service of a summons.

15  
16 Presented By: Thomas W. Swegle

17 THIS 8<sup>th</sup> DAY OF October, 1993

18  
19   
United States District Judge

1 THE UNDERSIGNED PARTIES enter into this consent Decree in the  
2 matter of United States v. Port of Tacoma, relating  
3 to the Commencement Bay Nearshore/Tideflats Superfund Site.

4 FOR THE UNITED STATES OF AMERICA

5  
6 Date: 8/11/93

W. E. Swegle  
7 Assistant Attorney General  
8 Environment and Natural Resources  
9 Division  
10 U.S. Department of Justice  
11 Washington, D.C. 20530

Thomas W. Swegle  
12 Thomas W. Swegle  
13 Environmental Enforcement Section  
14 Environment and Natural Resources  
15 Division  
16 U.S. Department of Justice  
17 Washington, D.C. 20530

Gerald A. Emison  
18 Gerald A. Emison  
19 Acting Regional Administrator  
20 Region 10  
21 U.S. Environmental Protection  
22 Agency  
23 1200 Sixth Avenue  
24 Seattle, WA 98101

Richard G. McAllister  
25 Richard G. McAllister  
26 Assistant Regional Counsel  
27 Region 10  
28 U.S. Environmental Protection  
Agency  
1200 Sixth Avenue  
Seattle, WA 98101

Thomas W. Swegle  
WA Bar Number 15667  
U.S. Department of Justice  
Envt. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3143

1 United States v. Port of Tacoma  
Consent Decree Signature Page

2

3 THE UNDERSIGNED PARTY enters into this Consent Decree in the  
4 matter of United States v. Port of Tacoma, relating  
5 to the Commencement Bay Nearshore/Tideflats Superfund Site.

6

7

FOR THE PORT OF TACOMA

8

9

Date: 6-1-93

Jack G. Falukid

10

11

12

13

Agent Authorized to Accept Service on Behalf of Above-signed  
Party:

14

Name: Robert I. Goodstein  
Title: General Counsel, Port of Tacoma  
Address: P.O. Box 1837, Tacoma, Washington 98401  
Tel. Number: (206) 383-9470

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SITCUM WATERWAY  
CONSENT DECREE - PAGE 110

Thomas W. Swegle  
WA Bar Number 15667  
U.S. Department of Justice  
Envt. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3143



1 THE WASHINGTON DEPARTMENT OF ECOLOGY

2

Mary Linnard

Dated: 6/4/93

3

4

The Washington Department of Ecology

5

Tanya Barnett

Dated: 3 June 1993

6

Tanya Barnett  
Assistant Attorney General  
State of Washington

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Thomas W. Swegle  
WA Bar Number 15667  
U.S. Department of Justice  
Envt. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3143

1 THE PUYALLUP TRIBE OF INDIANS

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Thomas W. Swegle

Dated: 4/30/93

Thomas W. Swegle  
WA Bar Number 15667  
U.S. Department of Justice  
Envt. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3143

1 THE MUCKLESHOOT INDIAN TRIBE

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*Virginia Crow*

Dated: JUL 26 1995

Thomas W. Swegle  
WA Bar Number 15667  
U.S. Department of Justice  
Env't. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-3143

Hon. Robert J. Bryan

FILED RECEIVED  
OCT 07 1993  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA  
BY DEPUTY

FILED RECEIVED LODGED  
OCT - 8 1993  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA  
DEPUTY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
ENTERED  
ON DOCKET

*cf/Financed*

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UNITED STATES OF AMERICA,  
ON BEHALF OF THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY,  
THE UNITED STATES DEPARTMENT OF  
THE INTERIOR, AND THE NATIONAL  
OCEANIC AND ATMOSPHERIC  
ADMINISTRATION;  
STATE OF WASHINGTON;  
PUYALLUP TRIBE OF INDIANS;  
MUCKLESHOOT INDIAN TRIBE;

Plaintiffs,

v.

PORT OF TACOMA

Defendant

OCT 8 1993  
By Deputy *[Signature]*

Civil No. C93-5462B

ORDER DIRECTING THE  
DEPOSIT OF NATURAL  
RESOURCE DAMAGES INTO  
THE REGISTRY OF THE  
COURT

This Order is entered in furtherance of a Consent Decree  
in the above captioned matter between Plaintiffs the United  
States of America, State of Washington, Puyallup Tribe of Indians  
and Muckleshoot Indian Tribe and Defendant the Port of Tacoma  
("Settling Defendant"). Under the Consent Decree, Settling  
Defendant has agreed, among other matters, to pay \$12,000,000

ORDER DIRECTING DEPOSIT OF  
NATURAL RESOURCE DAMAGES - 1

U.S. Department of Justice  
Environmental Enforcement Section  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044

*9*

1 (twelve million dollars), in installments as identified in the  
2 Consent Decree, to the Natural Resource Trustees (National  
3 Oceanic and Atmospheric Administration of the U.S. Department of  
4 Commerce, the U.S. Department of the Interior, the Washington  
5 Department of Ecology (on behalf of the Washington Department of  
6 Fisheries, the Washington Department of Natural Resources, and  
7 the Washington Department of Wildlife), the Puyallup Tribe of  
8 Indians, and the Muckleshoot Indian Tribe) in settlement of  
9 Settling Defendant's liability for Natural Resource Damages  
10 caused by releases of hazardous substances from property owned,  
11 managed or operated by Settling Defendant within the Commencement  
12 Bay Environment, as defined in the Consent Decree. This Order  
13 addresses handling and investment of those funds by the Registry  
14 of the Court.

15 Pursuant to Rule 67 of the Federal Rules of Civil  
16 Procedure, 28 U.S.C. § 2041, and Local Rule GR 6, and in  
17 accordance with the terms of the Consent Decree, it is hereby

18 1. ORDERED that Settling Defendant, following entry of the  
19 Consent Decree and in accordance with the payment schedules  
20 established therein, pay to the Clerk of the Court all sums  
21 specified in paragraph 51.b. of the Consent Decree, which sums  
22 constitute recovery for Natural Resource Damages and Future  
23 Trustee Assessment Costs, as defined in the Consent Decree; and  
24 it is

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ORDER DIRECTING DEPOSIT OF  
NATURAL RESOURCE DAMAGES - 2

U.S. Department of Justice  
Environmental Enforcement Section  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044

1 2. ORDERED that Settling Defendant shall make the  
2 aforementioned payments by checks made payable to the Clerk of  
3 the Court, bearing the notation Civil Action No. C93-5462B  
4 (W.D. Wash.), which checks shall be sent to:

5 Office of the United States Attorney  
6 3600 SeaFirst Fifth Avenue Plaza  
7 800 Fifth Avenue  
8 Seattle, Washington 98104

9 The U.S. Attorney shall immediately deposit such funds with the  
10 Registry of the Court. The Settling Defendant shall cause  
11 photocopies of each check and of any transmittal letter  
12 accompanying the check to be sent to: Chief, Environmental  
13 Enforcement Section, Department of Justice, P.O. Box 7611, Ben  
14 Franklin Station, Washington, D.C. 20044; and to Robert A.  
15 Taylor, NOAA Damage Assessment and Restoration Center, 7600 Sand  
16 Point Way NE, BIN C15700, Seattle, WA 98115; and it is

17 3. ORDERED that an account shall be established in the  
18 Registry for payments received in the above captioned matter and  
19 for such other payments as may be received from time to time in  
20 connection with restoration and protection of the ecosystem of  
21 the Commencement Bay watershed, and that the account shall be  
22 titled Commencement Bay Natural Resource Restoration Account  
23 ("Commencement Bay Restoration Account"); and it is

24 4. ORDERED that the Clerk of the Court shall administer the  
25 funds so received as follows:  
26

1 a) \$100,000 of the funds received shall be deposited in  
2 such interest-bearing federally insured commercial bank account  
3 or accounts as the Clerk deems appropriate;

4 b) the balance of the funds received shall be used to  
5 purchase 91-day Treasury Securities, at the highest prevailing  
6 interest rate available for such Treasury Securities;

7 c) upon maturity of the Treasury Securities referred to  
8 in subparagraph b), the Clerk shall consult with counsel for the  
9 United States regarding the allocation of the proceeds of such  
10 Treasury Securities between the bank account or accounts  
11 identified in subparagraph a) and the purchase of additional  
12 short-term Treasury Securities. Counsel for the United States  
13 shall consult with representatives of the Natural Resource  
14 Trustees and, depending upon the Natural Resource Trustees'  
15 anticipated funding needs, shall advise the Clerk regarding the  
16 desired allocation of such proceeds between the bank account or  
17 accounts and reinvestment in Treasury Securities. The Clerk may  
18 make any such allocations of funds as directed by counsel for the  
19 United States without further Order of the Court; and it is

20 5. ORDERED that all income earned as interest on funds so  
21 invested or deposited shall be credited to the Commencement Bay  
22 Restoration Account; and it is

23 6. ORDERED that the Natural Resource Trustees may apply to the  
24 Court for an Order establishing an investment procedure or  
25 vehicle alternative to that identified in paragraph 4 above that

1 provides a comparable level of security and earnings potential,  
2 which application may be acted upon by the Court without notice  
3 to or consent by Settling Defendant; and it is

4 7. ORDERED that the Clerk shall prepare quarterly reports on  
5 the status and activity of the Commencement Bay Restoration  
6 Account showing payments received, disbursements made, income  
7 earned, maturity dates of securities held, and principal balance,  
8 and shall distribute the reports to counsel for the United  
9 States; and it is

10 8. ORDERED that funds in the Commencement Bay Restoration  
11 Account shall remain in the Registry until further order of this  
12 Court; and it is

13 9. ORDERED that the Natural Resource Trustees shall establish  
14 such decision making procedures regarding expenditures of funds  
15 from the Commencement Bay Restoration Account as they deem  
16 appropriate. Applications for orders for disbursements from the  
17 Commencement Bay Restoration Account shall be made by the United  
18 States on behalf of the Natural Resource Trustees. The  
19 application shall be supported by a certification of the Natural  
20 Resource Trustees that their determination to make such  
21 disbursement was in compliance with said decision making  
22 procedures and is consistent with the terms of the Consent Decree  
23 and other applicable law. Such applications may be acted upon by  
24 the Court without notice to or consent by Settling Defendant.  
25 Any of the Natural Resource Trustees may petition the Court for




1 review of a decision by the United States to seek or not to seek  
2 an application for an order for disbursement, provided that the  
3 party or parties seeking review have complied with any dispute  
4 resolution provisions adopted as part of the decision making  
5 procedures referred to above; and it is

6 10. ORDERED that counsel for the United States shall serve as  
7 the point of contact for the Clerk on behalf of the Natural  
8 Resource Trustees, and shall distribute copies of the reports  
9 referred to in paragraph 7 of this Order to the other Natural  
10 Resource Trustees; and it is

11 11. ORDERED that the Clerk is authorized and directed by this  
12 Order to deduct for maintaining funds in the Registry Account the  
13 fee as authorized in the Federal Register Vol. 56, No. 213 at  
14 page 56356 (November 4, 1991); and it is

15 12. ORDERED that a certified copy of this Order shall be  
16 served upon the Clerk of this Court.

17  
18 Dated 8 October 1993

  
Hon. Robert J. Bryan, Judge  
United States District Court  
Western District of Washington

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APPENDIX E  
Wasser & Winters Property



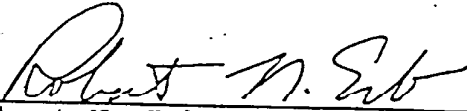
Description for Disturbance Barrier  
on Port of Tacoma Parcel 47

A strip of land 131 feet in width situate in the Southeast Quarter of Section 36, Township 21 North, Range 3 East of the Willamette Meridian, County of Pierce, State of Washington, whose Northeasterly line lies 131:00 feet Northeasterly of, as measured at right angles, the following described line:

BEGINNING at the most Easterly corner of a parcel of land conveyed to Cheney Port Mill Inc. by Statutory Warranty Deed recorded under Auditor's Fee Number 2539897; thence Northwesterly along the Northeasterly line of said parcel, North  $48^{\circ}15'35''$  West 1064.63 feet to the Pierhead line of the Hylebos Waterway and the END of said described line.

The sidelines of said strip of land shall be shortened or lengthened as required to terminate on the West right-of-way line of Marine View Drive and the Pierhead line of said Hylebos Waterway.

Containing 137,820 Square feet or 3.164 acres, more or less.



Robert N. Erb, P.L.S.  
Washington State Registration No. 18082

April 3, 1993  
Project No. 7526

Sitts & Hill Engineers, Inc.  
2901 South 40th Street  
Tacoma, Washington 98409  
(206) 474-9449

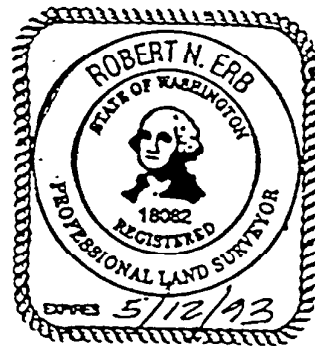


EXHIBIT E

APPENDIX F  
Option to Buy Real Property

OPTION TO BUY PROPERTY

NATURAL RESOURCE TRUSTEE  
(Optionee)

PORT OF TACOMA  
(Optionor)

1. Option. This Agreement is an Option to Purchase Real Property pursuant to the Sitcum Waterway Consent Decree related to a Natural Resource Damage claim asserted by Optionee.

2. Parties. This Agreement is between the NATURAL RESOURCE TRUSTEES, or such of them who may be nominated, as Optionee and the PORT OF TACOMA as Optionor.

3. Property Description. The property subject to the option (herein referred to as the "Option Area") is a part of that property commonly referred to by Optionor as the "East West Road Property". The legal description of the Option Area is described in Exhibit 1 attached to this Agreement.

4. Easement. At such time as the Option is exercised, Optionor shall reserve such easements as are necessary for reasonable ingress and egress across the Option Area. Optionor and Optionee will consult prior to any development of the Option Area by the Optionee and prior to the development of any easement improvement by Optionor so that any easement improvement made by Optionor will be designed to minimize impact on the habitat values of the Option Area.

5. Consideration. The rights, duties and obligations of the Optionee and Optionor pursuant to the Sitcum Waterway Consent Decree shall constitute reasonable consideration for this Option to Buy Real Property. In addition, Optionor agrees that it shall not take any action upon the "East West Road Property" that adversely impacts habitat protection values with the Option Area. Subject to the foregoing, nothing herein shall preclude Optionor's development of the "East West Road Property" outside the Option Area for industrial or commercial purposes.

6. Purchase Price. The purchase price of the property shall be the fair market value of the property as determined by an MAI appraiser mutually agreeable to the parties at the time the option is exercised. If the parties cannot agree upon an appraiser, then each party shall select one (1) appraiser and they shall select a third. The three (3) appraisers shall be instructed to determine value by consensus of the three.

7. Purchase Terms. Cash at closing, or such other valuable consideration as the parties may agree to at closing.

8. Option/Time Limit. In consideration of the rights, duties and obligations of the parties set forth in the Sitcum Waterway Consent Decree, the Optionee shall have the right to acquire the Option area no later than five (5) years after the date of the entry of the Sitcum Waterway Consent Decree.

9. Notice

a) Exercise of Option. Optionee may exercise this Option, only by written notice delivered or sent (postmarked) by certified mail, to Optionor at the Port of Tacoma, One Sitcum Plaza, Tacoma, Washington 98421 (P. O. Box 1837, 98401), at least thirty (30) days in advance of the expiration date of this Option.

b) Development or Use of Property. The Optionor shall provide Optionee with not less than ninety (90) days written notice of any development on the "East West Road Property" outside the Option Area.

10. Extension. There may be one (1) additional five (5) year extension of this Option upon mutually acceptable terms.

11. Closing. At least ten (10) days before the expiration date of this Option, the Optionee shall deposit into escrow with \_\_\_\_\_, the Closing Agent, all monies and documents necessary to close this transaction on or before the expiration date. Within five (5) days of deposit of Optionee's documents and money, Optionor shall deposit into escrow with said Closing Agent all documents and money required of the Optionor to close this sale.



12. Time is of the Essence. Time is of the essence of this Option. In the event that:

(a) Optionee shall fail to give notice of exercise of this Option within the time provided herein;

(b) This sale shall fail to close prior to the expiration date (through no fault of Optionor); or

(c) Optionee shall fail to deposit all necessary documents and money into escrow on or before the time required below; then this Option shall be null and void and Optionee's privilege to buy the property shall terminate.

13. Conveyance. Title to the property shall be conveyed by Statutory Warranty Deed. Conveyance of the fee interest herein shall be subject to a covenant restricting the use of the property to that of a natural habitat protection area. Optionor and Optionee shall each pay one-half of the escrow fee.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

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\_\_\_\_\_  
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\_\_\_\_\_  
OPTIONOR

OPTIONEES

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

I hereby certify that I know or have satisfactory evidence that

\_\_\_\_\_  
(Optionor's Name) appeared before me and signed this instrument  
and acknowledged it to be \_\_\_\_\_ free and voluntary act  
for the uses and purposes mentioned in this instrument.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for the  
State of Washington, residing at

My appointment expires: \_\_\_\_\_

RJG:ramborsie  
OptiProp  
6/4/93