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CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA, ON )  
BEHALF OF THE NATIONAL OCEANIC )  
AND ATMOSPHERIC ADMINISTRATION )  
AND THE UNITED STATES )  
DEPARTMENT OF THE INTERIOR; )  
STATE OF WASHINGTON THROUGH )  
THE WASHINGTON DEPARTMENT OF )  
ECOLOGY; PUYALLUP TRIBE OF )  
INDIANS; MUCKLESHOOT INDIAN )  
TRIBE, )

Plaintiffs,

v.

THE CITY OF TACOMA AND )  
THE TACOMA PUBLIC UTILITY )

Defendants. )

CIVIL NO.

CONSENT DECREE

**C97-5336** RJB

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U.S. Department of Justice  
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1 I. INTRODUCTION

2 The United States of America ("United States"), on behalf of the National Oceanic and  
3 Atmospheric Administration and the United States Department of the Interior, the State of  
4 Washington through the Washington Department of Ecology, the Puyallup Tribe of Indians and the  
5 Muckleshoot Indian Tribe, have filed a complaint in this matter against the City of Tacoma, its  
6 General Government, including the rate based storm and sewer utility of the Utility Services  
7 Engineering Division of the Public Works Department ("City"), and its Department of Public  
8 Utilities and its several divisions ("T.P.U."), pursuant to Section 107 of the Comprehensive  
9 Environmental Response, Compensation and Liability Act of 1980 as amended ("CERCLA"), 42  
10 U.S.C. § 9607, and the Model Toxics Control Act ("MTCA"), chapter 70.105D RCW. This Consent  
11 Decree addresses the claims asserted in the Complaint against the City and T.P.U. for Natural  
12 Resource Damages in the Commencement Bay Environment.

13 II. RECITALS

14 A. The United States Department of Commerce, acting through the National Oceanic  
15 and Atmospheric Administration, the United States Department of the Interior, the Washington  
16 Department of Ecology on behalf of the State of Washington, the Puyallup Tribe of Indians, and the  
17 Muckleshoot Indian Tribe, under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f),  
18 and 40 C.F.R. Part 300, subpart G, serve as Trustees for natural resources for the assessment and  
19 recovery of damages for injury to, destruction of, or loss of natural resources under their trusteeship.  
20 Because the monetary sums recovered by the Trustees are to be retained by the Trustees for use only  
21 to restore, replace, or acquire the equivalent of such natural resources, the Trustees have determined  
22 to accept, in lieu of and as equivalent to direct monetary recovery for Natural Resource Damages,  
23 the City's participation in a series of habitat restoration projects, provision of certain in-kind services  
24 for habitat restoration and environmental protection and enhancement, contributions to support  
25 habitat restoration actions and oversight by the Trustees, reimbursements for natural resource

1 damage assessment costs incurred by the Trustees, and T.P.U.'s participation in the specifically  
2 designated restoration projects as set forth below.

3 B. Investigations conducted by the United States Environmental Protection Agency  
4 ("EPA"), the City and others have detected hazardous substances (including polycyclic aromatic  
5 hydrocarbons or PAHs, cadmium, mercury, nickel, zinc, copper, lead, polychlorinated biphenyls or  
6 PCBs, and bis(2-ethylhexyl)-phthalate) in the sediments, soils, and groundwater of the  
7 Commencement Bay Environment.

8 C. The Trustees completed a pre-assessment screen in October of 1991. Preassessment  
9 Screen of Natural Resource Damages in the Commencement Bay Environment Due to Activities  
10 Taking Place In and About the Commencement Bay/Nearshore Tidelands (CB/NT) Superfund Site,  
11 October 29, 1991. The Trustees and certain major potentially responsible parties ("PRPs") entered  
12 into a Funding and Participation Agreement for Phase 1 of the Commencement Bay-Wide Natural  
13 Resource Damage Assessment dated February 10, 1993 (signed by City of Tacoma on March 5 and  
14 8, 1993). The Trustees published a report on the results of Phase 1 of the damage assessment  
15 process in June 1995. Scientific research conducted on natural resources in Commencement Bay  
16 indicates that many urban and industrial activities have resulted in releases of hazardous substances  
17 that have contributed to the injury to natural resources identified in these studies. Based on this  
18 research, the Parties agree that, as to the City and T.P.U., no further natural resource damage  
19 assessment is required to effectuate the purposes of this Consent Decree.

20 D. The United States of America on behalf of the National Oceanic and Atmospheric  
21 Administration and the Department of the Interior, the State of Washington through the Washington  
22 Department of Ecology, the Puyallup Tribe of Indians and Muckleshoot Indian Tribe have filed a  
23 complaint pursuant to CERCLA Section 107, 42 U.S.C. § 9607, and chapter 70.105D RCW, seeking  
24 recovery from the City and T.P.U. of damages for injury to, destruction of and loss of natural  
25 resources resulting from releases of hazardous substances into the Commencement Bay

1 Environment.

2 E. In their Complaint, the Plaintiffs allege that the City and T.P.U. own, manage or  
3 operate, or in the past have owned, managed or operated, real property or facilities (including a storm  
4 water drainage system) from which storm water, surface water runoff and/or groundwater have  
5 flowed to the Commencement Bay Environment. The Plaintiffs also allege that investigations by  
6 EPA, the City and others have detected in soils, groundwater and sediments on or in those properties  
7 or facilities concentrations of hazardous substances, some of which are contaminants found in the  
8 sediments of the Commencement Bay Environment.

9 F. The Plaintiffs allege that hazardous substance contaminants have been released to the  
10 Commencement Bay Environment from City and T.P.U.-owned, managed or operated properties or  
11 facilities through direct discharge, surface water runoff, groundwater and seeps, and that those  
12 contaminants have caused injury to, destruction of and loss to natural resources in the  
13 Commencement Bay Environment under their trusteeship, including fish, shellfish, invertebrates,  
14 birds, marine sediments, and resources of cultural significance. The Plaintiffs further allege that  
15 each of them and the public have suffered the loss of natural resource services (including ecological  
16 services as well as direct and passive human use losses) as a consequence of those injuries.

17 G. The Plaintiffs allege that the City and T.P.U. are: (a) the owner and operator of a  
18 vessel or a facility; (b) a person who at the time of disposal or release of any hazardous substance  
19 owned or operated any facility at which such hazardous substances were disposed of; (c) a person  
20 who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a  
21 transporter for transport for disposal or treatment, of hazardous substances owned or possessed by  
22 such person, by any other party or entity, or otherwise generated any hazardous substance disposed  
23 of or treated, at any facility or incineration vessel owned or operated by another party or entity and  
24 containing such hazardous substances, and/or (d) a person who accepts or accepted any hazardous  
25 substances for transport to disposal or treatment facilities, incineration vessels or sites selected by

1 such person, from which there is a release, or a threatened release which causes the incurrence of  
2 response costs, of a hazardous substance, within the meaning of 42 U.S.C. § 9607, and RCW  
3 70.105D.040.

4 H. The City and T.P.U. assert that they are not liable for Natural Resource Damages  
5 because the release or threat of release of a hazardous substance and the damages resulting therefrom  
6 were caused solely by an act of God or an act or omission of a third party, or were specifically  
7 identified as an irreversible and irretrievable commitment of natural resources in an environmental  
8 impact statement, or other comparable environment analysis, and the decision to grant a permit or  
9 license authorizes such commitment of natural resources, and the facility or project was otherwise  
10 operating within the terms of its permit.

11 I. The City and T.P.U. also assert that an allocable portion of the liability for costs or  
12 damages is a result of actions taken in response to an emergency created by the release or threatened  
13 release of a hazardous substance generated by or from a facility owned by another person; that the  
14 alleged releases are or are derived from the emissions from the engine exhaust of a motor vehicle  
15 or rolling stock; that a portion of the substances of concern are naturally occurring in their unaltered  
16 form, or altered solely through naturally occurring processes or phenomena, from a location where  
17 it is naturally found; that as to certain lands, facilities and operations, they have acquired ownership  
18 or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances  
19 in which the government involuntarily acquires title by virtue of its function as sovereign; and that  
20 their facilities and operations include consumer products in consumer use or any vessel.

21 J. The City and T.P.U. further assert that the City has made a substantial public  
22 investment in water quality; that the City was one of the first in the nation to segregate storm water  
23 from sewer lines and significantly reduced the risk of contamination; and that the City has been  
24 actively engaged in programs to increase protection of waters receiving urban run-off. The City and  
25 T.P.U. allege that the City has provided all reasonable cooperation and assistance requested by

1 responsible public officials, and that the City has engaged in extensive source control and education  
2 programs well in excess of its federal or state obligations to further eliminate unlawful discharges  
3 into the storm drain system. The City and T.P.U. also allege that the City has been an active and  
4 forceful voice for resolution of Natural Resource Damages; that the City has actively participated  
5 in the Funding and Participation Agreement, providing thirty-five thousand dollars for the Trustees  
6 to undertake an assessment of injuries within Commencement Bay to natural resources; that the City  
7 also launched, along with the Port of Tacoma several initiatives for resolving Natural Resource  
8 Damage issues baywide; that the City's initiative drew together the major public and private PRPs  
9 to address the question of liability, to promote creative and timely proposals for resolution, and to  
10 offer certainty and closure; and that the City has remained proactive in seeking solutions and  
11 promoting dialogue for resolving natural resource issues.

12 K. Although the Trustees have initiated but not yet completed a natural resource damage  
13 assessment for the Commencement Bay Environment, the Trustees have concluded that settlement  
14 at this time with the City and T.P.U. is reasonable and in the public interest.

15 L. This Consent Decree addresses the claims alleged in the Complaint against the City  
16 and T.P.U. for damages for injury to, destruction of, or loss of natural resources, including the  
17 reasonable costs of assessing such injury, destruction, or loss resulting from releases or threatened  
18 releases of hazardous substances in the Commencement Bay Environment under federal, state, tribal  
19 and common law. This Consent Decree does not address the City's or T.P.U.'s liability, if any, to  
20 EPA, the Washington Department of Ecology, or any other party for any removal, remedial action  
21 or response (as those terms are defined in Section 101 of CERCLA, 42 U.S.C. § 9601, or RCW  
22 70.105D.010), or the costs thereof. Nor does this Consent Decree address the City's or T.P.U.'s  
23 liability, if any, to the Trustees under CERCLA or other authority for Natural Resource Damages  
24 resulting from a release of hazardous substances in areas outside of the Commencement Bay  
25 Environment.



1 M. In settlement of this action the City and T.P.U. have agreed, in lieu of and as  
2 equivalent to monetary damages: a) to purchase, set aside or restrict real estate for the purpose of  
3 natural resource restoration, and the City has agreed, in lieu of and as equivalent to monetary  
4 damages, b) to construct and maintain a series of habitat restoration projects described in Appendices  
5 A through E, attached hereto and by this reference incorporated herein, c) to provide in-kind services  
6 for habitat restoration and environmental protection and enhancement, d) to contribute funds to  
7 support habitat restoration actions and oversight by the Trustees, and e) to reimburse natural resource  
8 damage assessment costs incurred by the Trustees.

9 N. The Parties stipulate that the real properties have the following fair market values,  
10 stated here solely for the purposes of expressing the contributions made by the City and T.P.U. in  
11 lieu of damages:

- 12 a. Middle Waterway Property (as detailed in Appendix A): \$384,258.
- 13 b. Swan Creek Property (as detailed in Appendix B): \$231,154.
- 14 c. Tahoma Salt Marsh Property (as detailed in Appendix C): \$574,338.
- 15 d. Hylebos Marsh Property (as detailed in Appendix D): \$1,377,000.
- 16 e. Olympic View Resource Area Property (as detailed in Appendix E): \$155,068.

17 O. The Trustees acknowledge that T.P.U. intends to utilize, for a power generation  
18 facility or comparable industrial use, the balance of the Hylebos Marsh Property not restricted under  
19 this Consent Decree for the Hylebos Marsh Project. The Parties believe that such a use can be  
20 designed to be compatible with an adjacent habitat restoration project, and the Parties are committed  
21 to working together to ensure that any such use will be consistent with the purposes and  
22 requirements of this Consent Decree.

23 P. The Trustees have determined that the timely actions and expenditures to be  
24 undertaken by the City and T.P.U. under this Consent Decree are appropriate and necessary to  
25 protect and restore the natural resources allegedly injured as a result of actions or omissions of the

1 City and T.P.U. that are addressed herein as Covered Matters, and that such timely actions and  
2 expenditures are adequate to redress the City's and T.P.U.'s responsibility for the Natural Resource  
3 Damages that are the subject of this proceeding.

4 Q. Failure by any party to dispute an allegation attributed to another Party in this Section  
5 of this Consent Decree (Section II, Recitals) does not constitute an admission of any such allegation.

6 R. The Parties recognize, and the Court in entering this Consent Decree finds, that this  
7 Consent Decree has been negotiated in good faith, that implementation of this Consent Decree will  
8 expedite the clean up of hazardous substances and restoration of natural resources, and avoid  
9 prolonged and complicated litigation between the Parties, and that this Consent Decree is fair,  
10 reasonable, consistent with CERCLA, MTCA and the regulations promulgated thereunder, and is  
11 in the public interest.

12 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

13 **III. JURISDICTION AND VENUE**

14 1. The Court has jurisdiction over the subject matter of this action and the Parties to this  
15 Consent Decree pursuant to 28 U.S.C. §§ 1331 and 1345, and Section 113(b) of CERCLA, 42  
16 U.S.C. § 9613. This Court also has personal jurisdiction over the Parties, which, solely with respect  
17 to this Consent Decree, waive all objections that they are not subject to jurisdiction of the Court to  
18 enter and enforce this Consent Decree or to venue in this District.

19 **IV. PARTIES BOUND**

20 2. This Consent Decree applies to and is binding upon the United States, the State of  
21 Washington, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe and upon the City of  
22 Tacoma and T.P.U. ("the Parties") and their agents, successors and assigns. Changes in the  
23 organizational form or status of a Party and transfers by that Party of any interest in any property  
24 affected by this Consent Decree shall in no way alter that Party's responsibilities under this Consent  
25 Decree. The signatories to this Consent Decree each certify that he or she is authorized to execute

1 and legally bind the respective party to this Consent Decree.

2 3. The City shall provide a copy of this Consent Decree to each contractor hired to  
3 perform work required by this Consent Decree and to each person representing the City with respect  
4 to such work, and shall condition all contracts entered into hereunder upon performance of such  
5 work in conformity with the terms of this Consent Decree. The City or its contractors shall provide  
6 written notice of the Consent Decree to all subcontractors hired to perform any portion of such work.  
7 The City shall nonetheless be responsible for ensuring that all work contemplated herein, including  
8 that performed by contractors and subcontractors, is performed in accordance with this Consent  
9 Decree.

10 **V. DEFINITIONS**

11 4. This Consent Decree hereby incorporates the definitions set forth in Section 101 of  
12 CERCLA, 42 U.S.C. § 9601, and MTCA, Chapter 70.105D, RCW, and regulations promulgated  
13 thereunder. In addition, whenever the following terms are used in this Consent Decree, they shall  
14 have the following meanings:

15 a. "City of Tacoma" or "City" means the city of the first class of the State of  
16 Washington of the same name, organized and doing business pursuant to the authority granted by  
17 the Constitution and Laws of the State of Washington, and the Charter of the City of Tacoma. The  
18 City of Tacoma includes all departments of its General Government, and the rate based storm and  
19 sewer utility divisions of the Public Works Department, its officers, directors, managers, employees,  
20 agents, representatives and contractors but does not include the Tacoma Public Utility and its several  
21 units.

22 b. "Commencement Bay Environment" means the waters of Commencement  
23 Bay, Washington, including the shoreline, intertidal areas and bottom sediments, lying south of a  
24 line drawn from Point Defiance to Dash Point, and including the Thea Foss Waterway, the Wheeler-  
25 Osgood Waterway, the Middle Waterway, the St. Paul Waterway, the Puyallup River from the

1 mouth south to the present City limits, the Milwaukee Waterway, the Sitcum Waterway, the Blair  
2 Waterway and the Hylebos Waterway. This area includes but is not limited to the Commencement  
3 Bay Nearshore/Tideflats Superfund Site, as identified or amended by EPA, and areas affected by  
4 releases of hazardous substances within the Commencement Bay Nearshore/Tideflats Superfund  
5 Site.

6 c. "Covered Matters" means any civil or administrative liability the City or  
7 T.P.U. may have to the Trustees for injury to, destruction of, or loss of any or all natural resources  
8 resulting in whole or in part from the release or threatened release of hazardous substances into the  
9 Commencement Bay Environment occurring prior to the effective date of this Consent Decree,  
10 except claims relating to treaties between the United States and the Puyallup Tribe of Indians and/or  
11 the Muckleshoot Indian Tribe. "Covered Matters" shall not be construed to include any matter that  
12 does not relate to recovery of Natural Resource Damages, such as orders requiring remedial action  
13 and actions to recover response costs pursuant to CERCLA, tribal law and the MTCA, chapter  
14 70.105D RCW, chapter 90.48 RCW, and the actions to administer and enforce the State Sediment  
15 Management Standards, chapter 173-204 WAC.

16 d. "Natural Resource Damages" means damages, including costs of damages  
17 assessment, recoverable under 42 U.S.C. § 9607, as amended, 33 U.S.C. § 1321, chapter 70.105D  
18 RCW, chapter 90.48 RCW, or any other federal, state, tribal or common law, for injury to,  
19 destruction of, or loss of any or all natural resources resulting in whole or in part from the release  
20 or threatened release of hazardous substances into the Commencement Bay Environment, except  
21 claims relating to treaties between the United States and the Puyallup Tribe of Indians and/or the  
22 Muckleshoot Indian Tribe.

23 e. "Tacoma Public Utility" or "T.P.U." means the Department of Public Utilities  
24 of the City of Tacoma, including its several divisions, its officers, directors, managers, employees,  
25 agents, representatives and contractors.

1 f. "Trustees" means the United States Department of Commerce, acting through  
2 the National Oceanic and Atmospheric Administration, the United States Department of the Interior,  
3 the Washington Department of Ecology on behalf of the State of Washington, the Puyallup Tribe  
4 of Indians, and the Muckleshoot Indian Tribe in their respective capacities as trustees for natural  
5 resources under applicable law.

6 VI. GENERAL PROVISIONS

7 5. The Complaint states claims upon which relief may be granted.

8 6. Nothing in this Consent Decree shall be construed as an admission by the City or  
9 T.P.U. of liability for any claims and allegations made in the Complaint or in this Consent Decree.

10 7. This Consent Decree shall not be used as evidence or as collateral estoppel against  
11 any Party to this Decree in any action or proceeding other than an action or proceeding to enforce  
12 the terms of this Consent Decree.

13 8. All activities undertaken by the City and T.P.U. pursuant to this Consent Decree shall  
14 be performed in accordance with the requirements of all applicable federal, state and local laws,  
15 permits and regulations.

16 9. All work performed by the City (including work performed by contractors of the  
17 City) and all in-kind services provided by the City under this Consent Decree shall be subject to full  
18 oversight by the Trustees. Subject to any applicable funding limitations set out herein, including  
19 Paragraphs 21 and 22, and the right of the City to invoke the dispute resolution provisions of  
20 Paragraph 38, the Trustees may require the City to take actions, to alter, suspend or cease ongoing  
21 activities, and to alter, postpone or refrain from taking proposed actions as the Trustees deem  
22 necessary to ensure compliance with the terms of this Consent Decree and any plans or proposals  
23 adopted hereunder.

24 10. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant  
25 to any federal or state statute or regulation.

1           11.     Where any portion of the activities undertaken pursuant to this Consent Decree  
2 requires a federal, state or local permit or approval, the City and T.P.U. shall submit timely and  
3 complete applications and take all other actions necessary to obtain all such permits or approvals.  
4 The City and T.P.U. shall use their best efforts to obtain any necessary permits :

5           12.     The Plaintiffs do not, by their consent to the entry of this Consent Decree, warrant  
6 or aver in any manner that the City's and T.P.U.'s compliance with this Consent Decree will result  
7 in compliance with CERCLA and other federal and state laws. Compliance with this Consent  
8 Decree does not diminish or affect the City's and T.P.U.'s responsibility to comply with any federal,  
9 state or local law or regulation. The Parties agree that the City and T.P.U. are responsible for  
10 achieving and maintaining complete compliance with all applicable federal and state laws,  
11 regulations and permits.

12           13.     This Consent Decree does not limit or affect the rights of any party as against any  
13 third parties, nor does it limit the rights of third parties, not parties to this Consent Decree, against  
14 the City, or against T.P.U., except as provided by Paragraph 53 and other applicable law.  
15 Specifically, the obligations stated in this Consent Decree shall not serve to establish an allocation  
16 of responsibility or to limit the City's or T.P.U.'s right to seek equitable or other contribution from  
17 other parties not signatories to this decree.

18   VII. LAND ACQUISITION AND DEDICATION

19           14.     a.     The City has acquired or shall acquire real property, permanently secure the  
20 right of use and preservation of real property, or permanently restrict the right of use for the  
21 following restoration projects ("the Projects"):

- 22   i.     Middle Waterway Project (as detailed in Appendix A)
- 23   ii.    Swan Creek Project (as detailed in Appendix B)
- 24   iii.   Tahoma Salt Marsh Project (as detailed in Appendix C)
- 25   iv.    Hylebos Marsh Project (as detailed in Appendix D)

1 v. Olympic View Resource Area Project (as detailed in Appendix E)  
2 The details and specifications concerning the type, location and acreage of the real property acquired  
3 or to be acquired (or the use of which has been or is to be acquired) by the City are set out in the  
4 appendices identified above, each of which is hereby incorporated in and made a part of this Consent  
5 Decree. In the event that any portion of the property described in the appendices listed above is  
6 composed wholly or partially of lands for which such right of use and preservation cannot as a matter  
7 of federal, state or local law be permanently secured, the City shall secure the right of use and the  
8 preservation of such lands or, if applicable, restrict the right of use for the maximum period  
9 permitted by law, and shall use its best efforts to obtain the renewal of such right, if any, upon the  
10 expiration of each such successive period; provided, the renewal can be obtained on substantially  
11 the same terms and conditions as the previous term.

12 b. T.P.U. shall dedicate or transfer to the City subject to all the conditions of this  
13 Consent Decree real property, permanently secure the right of use and preservation of real property,  
14 or permanently restrict the right of use for the following restoration projects:

- 15 i. Middle Waterway Project (west parcel) (as detailed in Appendix A)  
16 ii. Hylebos Marsh Project (as detailed in Appendix D); T.P.U.  
17 anticipates but is not obliged to create a separate parcel for the  
Hylebos Marsh Project

18 The details and specifications concerning the type, location and acreage of the real property acquired  
19 or to be acquired (or the use of which is to be acquired) by T.P.U. are set out in the appendices  
20 identified above, each of which is hereby incorporated in and made a part of this Consent Decree.  
21 In the event that any portion of the property described in the appendices listed above is composed  
22 wholly or partially of lands for which such right of use and preservation cannot as a matter of  
23 federal, state or local law be permanently secured, T.P.U. shall secure the right of use and the  
24 preservation of such lands or, if applicable, restrict the right of use for the maximum period  
25 permitted by law, and shall use its best efforts to obtain the renewal of such right, if any, upon the

1 expiration of each such successive period; provided, the renewal can be obtained on substantially  
2 the same terms and conditions as the previous term.

3 15. The City and T.P.U. shall obtain and impose all necessary restrictions, including  
4 easements, covenants and other legal instruments, on the parcels of property described in Paragraphs  
5 14.a and b. above respectively to ensure that the City and T.P.U., all future owners, lessees, assigns  
6 and their authorized agents, employees or persons acting under their direction or control, not use  
7 such property for any purpose the effect of which is inconsistent with the purposes of the restoration  
8 project developed thereon as described in the applicable appendix for each Project. The City and  
9 T.P.U. shall take all necessary steps to ensure that these restrictions run with the land and continue  
10 in perpetuity or the maximum time permitted by law. Such restrictions shall be substantially in the  
11 form included in Appendix G, incorporated in and made a part of this Consent Decree.

12 16. The City and T.P.U. shall record in the applicable real property records for each  
13 parcel of real property affected by this Consent Decree a notice, substantially in the form included  
14 in Appendix H, incorporated in and made a part of this Consent Decree, informing prospective  
15 purchasers or lessees of the existence of this Consent Decree and of the fact that the transfer and use  
16 of the parcel are subject to the requirements and restrictions of this Consent Decree, including those  
17 detailed in Paragraphs 14 and 15 above.

18 17. The City and T.P.U. shall not sell, grant, lease or otherwise transfer to any party an  
19 interest in any of the real property described in Paragraph 14.a. or b. other than as specifically  
20 contemplated in this Consent Decree without the prior written consent of the Trustees, the United  
21 States Department of Justice, and the approval of the Court.

22 18. The City or T.P.U. may, with approval of the Trustees and the United States  
23 Department of Justice, and subject to Paragraphs 22 k. and 60 of this Consent Decree, substitute real  
24 property of a comparable size, type, location and elements for the real property specified in  
25 Paragraph 14.a. or b. above and, as necessary, construct thereon at its expense, subject to the



1 limitations of Paragraph 22, a substitute restoration project of a size, type, configuration and with  
2 such elements as are necessary to replace the natural resource values existing at the time of the  
3 contemplated substitution on the property the proposed substitute restoration project would replace.  
4 With respect to any substitute parcel of property, the City or T.P.U. shall incur the same obligations  
5 described in Paragraphs 14.a. or b. above, and such property shall be subject to the future use  
6 restrictions described in Paragraph 15 above and the limitations of Paragraph 22 below. Neither the  
7 City nor T.P.U. shall be obliged to substitute real property of the same fair market value. Rather,  
8 a substitute property shall be deemed adequate based on the factors stated above. Notwithstanding  
9 the foregoing, neither the City nor T.P.U. shall incur additional acquisition costs if a substitute site  
10 is sought for the Hylebos Marsh Project site.

#### 11 VIII. RESTORATION AND REHABILITATION PROJECTS

12 19. Subject to funding limitations set forth in Paragraph 22 below and to the provisions  
13 of Paragraphs 22.k. and 60, the City shall provide the funds and services and take all necessary steps  
14 to construct, maintain, monitor and evaluate the Projects in accordance with the details,  
15 specifications and Project Development Schedule set out in the appendices identified above. The  
16 Parties intend and expect each of the Projects to result in a substantial gain to the Commencement  
17 Bay Environment in terms of natural resource enhancement and habitat restoration. However, the  
18 Parties recognize that many factors are beyond the reasonable control of the City or T.P.U. and that  
19 there exists a degree of risk associated with each Project.

20 20. For each of the Projects, the City shall develop a Project Construction Plan, a Project  
21 Maintenance Plan, and a Project Monitoring and Adaptive Management Plan. Each of the identified  
22 plans for each Project shall be submitted to the Trustees for approval in accordance with the Project  
23 Development Schedule included in the appendix applicable to each Project.

24 21. As regards each of the identified Projects, the City and T.P.U., as applicable (a., b.  
25 and h. below for T.P.U.), shall, in compliance with the applicable Project Development Schedule:

- 1           a.     Apply for and use best efforts to obtain and comply with all applicable permits  
2 required under relevant federal, tribal, state or local laws and ordinances;
- 3           b.     Complete the acquisition of real property, the securing of property use rights  
4 and the creation and recording of deed restrictions or other legal instruments as appropriate for each  
5 of the Projects as described in Paragraphs 14 through 16 above;
- 6           c.     Construct or have constructed the Project in accordance with the applicable  
7 Project Construction Plan;
- 8           d.     Maintain the Project in accordance with the applicable Project Maintenance  
9 Plan;
- 10          e.     Monitor and evaluate the Project, and, subject to Paragraph 22.g. below, take  
11 such adaptive management actions as agreed to or required by the Trustees, in accordance with the  
12 applicable Project Monitoring and Adaptive Management Plan;
- 13          f.     Provide to the Trustees, within 60 days following the end of each quarter (i.e.,  
14 by May 30, August 29, November 29, and March 1), quarterly statements and such supporting  
15 documentation and accounting as the Trustees shall determine necessary regarding the costs incurred  
16 relative to the Project (including, where applicable, costs for maintenance and adaptive  
17 management). Costs incurred prior to the effective date of this Consent Decree may be submitted  
18 with either of the first two quarterly statements due after the effective date;
- 19          g.     Provide to the Trustees the Project Completion Accounting as required under  
20 Paragraph 22.f.; and
- 21          h.     Avoid taking or permitting another to take any action on the Project site  
22 property or on adjacent properties owned or controlled by the City or T.P.U. that is inconsistent with  
23 this Consent Decree and that will interfere with the Project such that it will substantially decrease  
24 the likelihood of success of the Project. The Parties agree that the current actions by the City and  
25 T.P.U. on adjacent properties are not inconsistent with this Consent Decree. The Parties further

1 agree that, as regards the Hylebos Marsh Project (as detailed in Appendix D), a power generation  
2 facility or comparable industrial use on adjacent properties that produces or is projected to produce  
3 the impacts described in Appendix I at a level no greater than that provided in Appendix I shall not  
4 be deemed inconsistent with this Consent Decree solely on the basis of such impacts.

5 To the extent that the City or T.P.U. have fulfilled their obligations under this Section  
6 (Section VIII, Restoration and Rehabilitation Projects) but the completed project reflects a lower  
7 than expected habitat or natural resource value, the City or T.P.U. will have, nonetheless, satisfied  
8 the obligations so undertaken.

9 22. The City shall be obligated to incur no more than \$3,364,929 (three million three  
10 hundred sixty-four thousand nine hundred twenty-nine dollars) in Project Expenditures and Project  
11 Contingency Funds applicable to all the Projects combined. The City's obligations under this  
12 Paragraph shall include costs chargeable as Project Expenditures and Project Contingency Funds  
13 incurred by the City prior to the effective date of this Consent Decree.

14 a. Project Expenditures shall include only the reasonable and necessary costs of  
15 Project design, permitting and contracting, demolition, clearing, grading, excavation, construction,  
16 planting and other activities to develop the Project in accordance with the Project Construction Plan  
17 and the applicable appendix, as agreed to or required by the Trustees; maintenance activities as  
18 agreed to or required by the Trustees in order to implement the Project Maintenance Plan; and  
19 monitoring as agreed to or required by the Trustees in order to implement the Project Monitoring  
20 and Adaptive Management Plan. Project Expenditures do not include the costs of acquiring,  
21 dedicating or securing the right of use of real property.

22 Total Project Expenditures shall equal \$2,908,129 (two million nine hundred eight thousand  
23 one hundred twenty-nine dollars) for all Projects, allocated as follows:

- 24 i. Middle Waterway Project \$702,050
- 25 ii. Swan Creek Project \$721,100

1                   iii.     Tahoma Salt Marsh Project \$642,800  
2                   iv.     Hylebos Marsh Project \$362,204  
3                   v.     Olympic View Resource Area Project \$479,975  
4                 b.     Project Contingency Funds shall cover only the reasonable and necessary  
5 costs of construction cost-overruns, change orders, contaminant source control activities, on-site  
6 contaminant removal or remedial action, and adaptive management actions in accordance with the  
7 Project Monitoring and Adaptive Management Plan, as agreed to or required by the Trustees.  
8 Project Contingency Funds may include the costs of acquiring, dedicating or securing the right of  
9 use of or substituting real property only for the Middle Waterway Project and/or the Olympic View  
10 Project, totaling no more than \$97,000, incurred between August 1, 1996 and one year after the  
11 effective date of this Consent Decree, as agreed to by the Trustees. Total Project Contingency Funds  
12 shall equal \$456,800 (four hundred fifty-six thousand eight hundred dollars) for all Projects,  
13 allocated as follows:

- 14                   i.     Middle Waterway Project \$114,200
- 15                   ii.    Swan Creek Project \$45,680
- 16                   iii.   Tahoma Salt Marsh Project \$91,360
- 17                   iv.    Hylebos Marsh Project \$91,360
- 18                   v.     Olympic View Resource Area Project \$114,200

19                 c.     The Trustees shall promptly review the quarterly cost statements and  
20 supporting documentation submitted by the City pursuant to Subparagraph 21.f. above to verify that  
21 the costs proposed by the City as charges against Project Expenditures and Project Contingency  
22 Funds are reasonable and necessary for the Project or Projects concerned and are consistent with the  
23 appendix, Project Construction Plan, Project Maintenance Plan and/or Project Monitoring and  
24 Adaptive Management Plan for the Project or Projects concerned. The Trustees' assent to the  
25 proposed charges may be presumed unless the Trustees notify the City in writing of their

Elizabeth L. Loeb  
U.S. Department of Justice  
Washington, D.C. 20044  
(202) 616-8916

1 disagreement with the proposed charges within 60 days of receiving the cost statement and  
2 supporting documentation. Where the Trustees disagree with the nature or amount of a proposed  
3 charge, the Trustees shall include with their notice of disagreement any cost comparison or other  
4 information supporting their position. Subject to the provisions of Paragraph 38, any proposed  
5 charges determined by the Trustees not to be reasonable and necessary for the Project or Projects  
6 concerned, and/or consistent with the appendix, Project Construction Plan, Project Maintenance Plan  
7 and/or Project Monitoring and Adaptive Management Plan for the Project or Projects concerned shall  
8 not be counted toward the City's obligations under Project Expenditures or Project Contingency  
9 Funds.

10           d.       Within 90 days prior to the earlier of the anticipated or scheduled date of  
11 completion of the construction of each Project, the City shall submit a written Notice of Projected  
12 Completion to the Trustees. Within 60 days after receiving the Notice of Projected Completion, the  
13 Trustees shall review the course and results of the development of the Project to determine whether  
14 the Project has been completed, to date, in accordance with the Project Construction Plan and the  
15 applicable appendix. Within 30 days of such review, the Trustees shall submit to the City either (1)  
16 a written notice identifying specific deficiencies the Trustees determine must be satisfied for the  
17 Project to be completed in accordance with the Project Construction Plan and the applicable  
18 appendix (Notice of Deficiencies); or (2) a written notice of the Trustees' determination that the  
19 Project has been so completed as of the date of notice (Notice of Approval of Interim Progress).  
20 Following receipt of a Notice of Deficiencies, the City shall, subject to the provisions of Paragraph  
21 21 and this Paragraph, correct the identified deficiencies, complete the Project in accordance with  
22 the Project Development Schedule, and submit to the Trustees an amended Notice of Project  
23 Completion for review and response in accordance with this Subparagraph.

24           e.       Upon completion of construction of each Project, the City shall submit a  
25 written Notice of Completion to the Trustees. The Trustees shall review the course and results of

1 the development of the Project to determine whether the Project has been completed in accordance  
2 with the Project Construction Plan and the applicable appendix. Within 60 days after receiving the  
3 Notice of Completion, the Trustees shall submit to the City either (1) a written notice identifying  
4 specific deficiencies the Trustees determine must be satisfied for the Project to be completed in  
5 accordance with the Project Construction Plan and the applicable appendix (Notice of Deficiencies);  
6 or (2) a written notice of the Trustees' determination that the Project has been so completed (Notice  
7 of Approval of Completion). Following receipt of a Notice of Deficiencies, the City shall, subject  
8 to the provisions of Paragraph 21 and this Paragraph, correct the identified deficiencies, complete  
9 the Project in accordance with the Project Development Schedule, and submit to the Trustees an  
10 amended Notice of Completion for review and response in accordance with this Subparagraph. Any  
11 delay in completing Project construction as a result of the operation of this Subparagraph shall not  
12 in and of itself constitute grounds for relief from the requirement to pay under Paragraph 39 for  
13 compliance delays.

14 f. Within 60 days following receipt of the Trustees' Notice of Approval of  
15 Completion for each Project, the City shall submit to the Trustees a Project Completion Accounting.  
16 The Project Completion Accounting shall: itemize the costs incurred by the City as Project  
17 Expenditures in developing the Project; contain an estimate of the costs of carrying out the actions  
18 needed to comply with the Project Maintenance Plan and the costs of carrying out the monitoring  
19 activities required under the Project Monitoring and Adaptive Management Plan; and show the  
20 uncommitted balance, if any, of Project Expenditures allocated to the Project less costs incurred and  
21 estimated to be incurred. In addition, the Project Completion Accounting shall: itemize the costs  
22 incurred by the City as Project Contingency Funds for construction cost overruns, change orders and  
23 on-site contaminant remedial action; and show the balance, if any, of Project Contingency Funds  
24 allocated to the Project less costs incurred.

25 g. As agreed to or required by the Trustees, the City shall apply any portion of

1 the Project Expenditures allocated to a particular Project and identified as an uncommitted balance  
2 in the Project Completion Accounting or by agreement of the Parties, to augment Project  
3 Expenditures for one or more of the remaining Projects or to augment the Project Contingency Funds  
4 applicable to any of the Projects. Should any portion of the total Project Expenditures for all  
5 Projects remain unspent following completion of construction for all of the Projects and not be  
6 otherwise committed to ongoing maintenance and monitoring obligations, the Trustees may elect  
7 to direct that the City either (1) apply the remainder of the Project Expenditures to expand the scope,  
8 frequency or duration of the monitoring program or implement recommendations detailed in the  
9 Project Monitoring and Adaptive Management Plan or other recommendations that may arise as a  
10 result of project monitoring for one or more Projects; or (2) deposit the sums in the Commencement  
11 Bay Natural Resource Restoration Account, established per the Order Directing the Deposit of  
12 Natural Resource Damages Into the Registry of the Court, entered on October 8, 1993, in the matter  
13 of United States, et al. v. Port of Tacoma, W.D. Wash. C93-5462B. The Trustees' election under  
14 this Subparagraph shall be made in a written notice to the City. The City shall make any deposit of  
15 funds required under this Subparagraph within 60 days after receiving written notice of the Trustees'  
16 election.

17 h. Project Contingency Funds, if any, that remain unexpended following the  
18 completion of construction for all of the Projects shall be used to perform adaptive management  
19 actions in accordance with the Project Monitoring and Adaptive Management Plan. The Trustees  
20 may elect to direct that the City either (1) perform such adaptive management actions (subject to the  
21 funding limits set forth in Subparagraph b. above); or (2) deposit the sums in the Commencement  
22 Bay Natural Resource Restoration Account identified in Subparagraph g. The Trustees' election  
23 under this Subparagraph shall be made in a written notice to the City.

24 i. If the Trustees do not elect to direct that the City perform adaptive  
25 management actions, the City shall within 60 days after receiving written notice of the Trustees'

1 election deposit the unexpended balance of the Project Contingency Funds in the Commencement  
2 Bay Natural Resource Restoration Account identified in Subparagraph g.

3           ii. If the Trustees elect to direct that the City perform adaptive  
4 management actions, the City shall include in the quarterly statements identified in Paragraph 21.f.  
5 a quarterly accounting of expenditures for adaptive management actions. The City's obligations to  
6 perform adaptive management actions shall end upon the earlier of (1) the expenditure of the balance  
7 of the Project Funds; or (2) the first anniversary of the acceptance by the Trustees of the final project  
8 monitoring report. If the City's obligations end in accordance with item (2) in the preceding  
9 sentence, the City shall within 60 days of the first anniversary of the Trustees' acceptance of the final  
10 project monitoring report for the last of the Projects deposit any remaining Project Contingency  
11 Funds in the Commencement Bay Natural Resource Restoration Account identified in Subparagraph  
12 g.

13           i. Sums deposited in the Commencement Bay Natural Resource Restoration  
14 Account under this Paragraph may be used by the Trustees to perform adaptive management actions  
15 on any of the Projects or to fund one or more additional restoration projects in the Commencement  
16 Bay Environment.

17           j. The Trustees may, with the concurrence of the City, apply Natural Resource  
18 Damages obtained from another party or parties to augment the funds to be supplied by the City for  
19 Project Expenditures or Project Contingency Funds.

20           k. The City and T.P.U. may, with approval of the Trustees and the United States  
21 Department of Justice and subject to Paragraph 60 of this Consent Decree, substitute projects of a  
22 comparable size, type, location and elements for the original projects specified in this Paragraph and,  
23 as necessary, construct at its expense, subject to the limitations of Paragraph 21 and this Paragraph,  
24 a substitute restoration project of a size, type, configuration and with such elements as are necessary  
25 to replace the original project. In the event that a substitute project is proposed and accepted before



1 completion of the original project the City shall receive full credit for all tasks completed and  
2 reasonable expenses incurred in attempting completion of the original project. The City's and  
3 T.P.U.'s obligations with respect to the substitute project shall substantially equal the residual,  
4 uncompleted component of the original project. Where a substitute project is proposed and accepted  
5 the City shall be credited all expenses associated with such substitution such as but not limited to  
6 costs of acquisition, assessment, investigation, sampling, design, and redesign. With respect to any  
7 substitute project, the City and T.P.U. shall incur the same obligations described in this Paragraph  
8 above, subject to the limitations of Paragraph 21 and this Paragraph 22.

9 IX. POST-CONSTRUCTION ALTERATIONS:  
10 FURTHER RESTORATION ACTIONS

11 23. In addition to any measures undertaken in connection with the Project Monitoring  
12 and Adaptive Management Plans identified in Paragraph 20, following construction of each of the  
13 Projects, the Trustees may at any time make such post-construction alterations or implement such  
14 further restoration actions on the Project site as they determine appropriate. Such post-construction  
15 alterations or further restoration actions shall only be taken with the approval of the City, which  
16 approval may be withheld only upon a showing that the proposed activity would be inconsistent with  
17 the purposes of the Project affected as described in the applicable appendix, would be inconsistent  
18 with other provisions of this Consent Decree or other applicable law, would impose uncompensated  
19 costs upon the City, or would be inconsistent with other uses of adjacent City-owned properties.

20 X. ENVIRONMENTAL PROTECTION EFFORTS

21 24. To ensure that habitat restoration and enhancement areas remain viable and  
22 productive, for a five-year period after the Trustees accept the proposal as provided in Paragraph 26  
23 the City shall, subject to the limitations set forth in Paragraph 25, provide the personnel, equipment,  
24 material, services and funding for the following additional measures, above and beyond those  
25 already in place and in effect to ensure that existing environmental quality and natural resource

1 protective regulatory authorities are aggressively applied and implemented as follows:

2 a. The City shall establish and operate a Bay-watch hotline for receiving and  
3 referring reports of acts or omissions that may cause or lead to violations of environmental quality  
4 and natural resource protective regulations. The City shall support the reporting system with public  
5 awareness communications designed to ensure system success, including but not limited to video-  
6 based advertisements on the Tacoma Municipal Television Channel, newspaper advertisements, and  
7 posters in strategic locations.

8 b. In addition to the reporting system identified in Subparagraph a., the City  
9 shall use City marine vessels for patrolling the Commencement Bay Environment, and for  
10 responding to incidents of pollution or other activities where immediate response is needed to  
11 document violations of local, state, federal or tribal regulations. At a minimum, City regulatory staff  
12 from the City Shoreline Management Program will utilize the vessel on a monthly basis for a regular  
13 inspection of Commencement Bay Environment shoreline areas now largely unpatrolled.

14 c. Any other activities that are agreed to by the City and Trustees.

15 25. The City shall be obliged to incur a total of \$75,000 in costs (incurred at the rate of  
16 \$15,000 per year) in fulfilling the obligations of Paragraph 24.

17 26. Within 90 days after the entry of this Consent Decree, the City shall submit to the  
18 Trustees a proposal describing the steps the City intends to take to fulfill the obligations of  
19 Paragraphs 24 and 25. The proposal shall specify a timetable by which significant tasks shall be  
20 initiated, shall identify by grade, title, salary and level of benefits the employees who are to perform  
21 the tasks, and shall provide an employee-specific analysis of the work to be performed and the costs  
22 of that work. The Trustees may accept or reject any such proposal in its entirety or, to the extent  
23 practicable, may accept or reject one or more portions of the proposal. The Trustees shall notify the  
24 City in writing of their decision and shall specify the tasks or portions of tasks identified in the  
25 City's proposal the Trustees have accepted. In the event the Trustees reject one or more portions of

1 the proposal, within 60 days after receipt of the notice from the Trustees the City shall submit to the  
2 Trustees an amended proposal, addressing issues raised by the Trustees' notice and designed to  
3 satisfy the City's financial obligations under Paragraph 25 and to effect the purposes of this Section.

4 27. Within 60 days after the end of each calendar year following the entry of this Consent  
5 Decree, and until such time as the total funds identified in Paragraph 25 have been expended, the  
6 City shall provide an annual report to the Trustees documenting the actions taken to implement this  
7 Section and the costs incurred in doing so.

#### 8 XI. IN-KIND SERVICES

9 28. In addition to any in-kind services provided by the City under the foregoing  
10 provisions, the City shall provide in-kind services under the direction of the Trustees to assist the  
11 Trustees in further identifying and quantifying injuries to and loss of natural resources in the  
12 Commencement Bay Environment requiring restoration and in planning and carrying out restoration  
13 actions.

14 a. The total cost of such services to be provided by the City under this Paragraph  
15 shall be not less than \$250,000, obligated at a maximum rate of \$50,000 per year (or such greater  
16 rate in any year as the Parties may agree), provided that unobligated expenditures from one year shall  
17 be carried forward to supplement expenditures in subsequent years.

18 b. The in-kind services covered by this Paragraph shall be provided by City  
19 employees, contractors retained by the City or some combination of both. At the direction of the  
20 Trustees, the City shall provide up to one-third of the in-kind services through contractors retained  
21 by the City. Subject to the Trustees' agreement, the City may elect also to provide any or all of the  
22 balance of the in-kind services through contractors. The cost of the in-kind services to be provided  
23 by City employees under this Consent Decree shall be calculated on the basis of the cost rates  
24 provided in Appendix F, which is hereby incorporated in and made a part of this Consent Decree.  
25 Costs of in-kind services provided through contractors shall be the invoiced costs of such services,

1 subject to Trustee prior approval.

2 c. Within 90 days after the entry date of this Consent Decree and by June 30 of  
3 each year thereafter until such time as the \$250,000 total amount specified in Subparagraph a. has  
4 been expended, the Trustees and the City shall consult regarding the activities the Trustees plan to  
5 undertake during the following calendar year that could utilize the in-kind services to be provided  
6 under this Paragraph. On the basis of that consultation, within 180 days after the entry date of this  
7 Consent Decree and by September 30 of each such year thereafter the City shall submit to the  
8 Trustees a proposed in-kind services plan describing those tasks or portions of tasks that the City  
9 proposes to perform during the calendar year in question to assist the Trustees' planned activities.  
10 The proposed plan shall identify by grade, title, salary and level of benefits the employees who are  
11 to perform the specified services, and shall provide an employee-specific analysis of the work to be  
12 performed and the costs of that work. The Trustees may accept or reject any such proposed plan  
13 in its entirety or, to the extent practicable, may accept or reject one or more portions of a plan. As  
14 a condition of acceptance, the Trustees may specify such conditions as are necessary to ensure  
15 adequate oversight by the Trustees of the services to be provided and appropriate coordination with  
16 the efforts of contractors and others. The Trustees shall notify the City in writing of their decision  
17 and shall specify the tasks or portions of tasks identified in the City's proposed plan the Trustees  
18 have accepted. For purposes of the in-kind services to be provided during calendar year 1997, the  
19 initial consultation meeting provided for in this Subparagraph shall take place within 60 days  
20 following entry of this Consent Decree and the City shall provide the proposed in-kind services plan  
21 within 45 days following such meeting.

22 d. If, as a result of the process described in the preceding Subparagraph, the  
23 Trustees do not approve an in-kind services plan for any calendar year utilizing the total annual  
24 maximum costs available for that year, after further consultation with the City the Trustees may  
25 propose that the City provide additional in-kind services, subject to the annual cost maxima provided

1 in Subparagraph a. The Trustees shall make any proposals for work assignments to the City in  
2 writing, setting forth the scope and specifications of the work required and the date by which  
3 appropriate work products are to be delivered. The City shall comply with the Trustees' proposal  
4 except to the extent that the City can demonstrate that compliance with the proposal would result  
5 in severe administrative hardship or would exceed the cost maximum applicable to the year in  
6 question. The City shall notify the Trustees in writing within 45 days following receipt of the  
7 Trustees' proposal of the City's intention to comply with the proposal or, if applicable, the reasons  
8 for non-compliance.

9 e. The types of services to be provided under this Paragraph include but are not  
10 limited to: use of vessels and crew; field support for vessel or aircraft operations; logistical support  
11 for sample collection, handling, preservation, storage and transport; laboratory analysis of  
12 environmental samples; collection and analysis of economic data; data management support,  
13 including geographical information system or computer-aided design services and data; engineering  
14 and survey, earth-moving, landscaping, irrigation, planting, utility services, grounds maintenance  
15 and security activities; health and human safety support; educational, training and interpretive  
16 activities; graphics, design, printing, reproduction, communications, photography, videography and  
17 sound recording services.

18 f. The Trustees may specify that all or a portion of a particular work assignment  
19 identified under this Paragraph be performed by a contractor, by the City or by identified City  
20 employees; provided that, to the extent practicable and consistent with the work assignment, the  
21 Trustees shall accommodate the City's requests regarding the availability of personnel.

22 g. Within 45 days after the end of each calendar year following the entry of this  
23 Consent Decree, and until such time as the total costs identified have been expended, the City shall  
24 provide an annual report documenting the costs so incurred and detailing the actions taken.

## 25 XII. ACCESS TO INFORMATION AND PROJECT SITES

1           29. To facilitate their oversight responsibilities, the Trustees shall have full access to all  
2 work in progress required under this Consent Decree.

3           30. Commencing upon the date of lodging of this Consent Decree, the City and T.P.U.  
4 agree to provide the Trustees and their contractors access at all reasonable times to the site of each  
5 of the Projects and to any property to which access is required for the oversight or implementation  
6 of this Consent Decree. Where the property to which access is sought is not otherwise open to public  
7 access, the Trustees shall give notice prior to access. Each Trustee shall have the authority to enter  
8 freely and move about such property at all reasonable times for the purposes of overseeing the  
9 requirements of this Consent Decree, including, but not limited to:

- 10           a. Monitoring and assessing progress on the planning, development,  
11 maintenance and monitoring of the Projects;
- 12           b. Verifying any data or information submitted to the Trustees;
- 13           c. Inspecting and copying records, operation logs, contracts or other documents  
14 maintained or generated by the City or its agents or contractors for the work  
15 undertaken pursuant to this Consent Decree;
- 16           d. Conducting such tests, investigations or sample collections as deemed  
17 necessary to monitor compliance with this Consent Decree or to assist in  
18 further identifying and quantifying natural resource injuries requiring  
19 restoration actions and in planning and carrying out further restoration  
20 actions;
- 21           e. Using a camera, sound recording device or other type equipment to record the  
22 work done under this Consent Decree or injury to natural resources;
- 23           f. Undertaking any maintenance action the Trustees determine necessary; and
- 24           g. Undertaking post-construction alterations or further restoration actions in  
25 accordance with Paragraph 23.

26           31. The City and T.P.U. shall have the right to accompany any Trustee or its  
representative on the property. Anyone provided access through this Consent Decree shall comply  
with applicable health and safety requirements and shall not interfere, to the extent practicable, with  
ongoing operations.



1           b.     The Puyallup Tribe of Indians and the Muckleshoot Indian Tribe shall each  
2 provide an annual report to the Trustees and the City documenting how funds disbursed under this  
3 Paragraph have been utilized.

4           c.     Funds disbursed to either the Puyallup Tribe of Indians or the Muckleshoot  
5 Indian Tribe under this Paragraph and not expended within the year disbursed shall be retained by  
6 the respective Tribe and used only for the purposes provided in this Paragraph. Any such funds so  
7 disbursed and not expended for the purposes provided in this Paragraph prior the Trustees' issuance  
8 of a Notice of Approval of Completion under Paragraph 22.e. for the last of the Projects to be  
9 completed shall be deposited by the Tribe holding such funds to the Commencement Bay Natural  
10 Resource Restoration Account identified in Paragraph 22.g. to be used by the Trustees to fund one  
11 or more additional restoration projects in the Commencement Bay Environment.

12                   XV. REIMBURSEMENT OF RESTORATION OVERSIGHT COSTS

13           34.    The City shall reimburse Trustee costs incurred in the oversight of the development  
14 and maintenance of the Projects and the implementation of other elements of this Consent Decree  
15 in the total amount of \$500,000 (five hundred thousand dollars). The costs covered by this  
16 Paragraph include staff salary, benefits and indirect support costs; travel costs; materials and  
17 supplies; and payments for goods and services.

18           a.     Payment shall be made in ten payments of \$50,000 (fifty thousand dollars)  
19 each, with the first payment being due within 45 days after entry of this Consent Decree. Subsequent  
20 payments shall be made by October 1 of each year beginning with October 1, 1997 and ending with  
21 October 1, 2005. Sums paid under this Paragraph shall be deposited in the Commencement Bay  
22 Natural Resource Restoration Account, identified above in Paragraph 22.g., for distribution among  
23 the Trustees as they shall determine in accordance with the terms of this Consent Decree and other  
24 applicable law. Prior to any distribution, the Trustees shall provide the City a Notice of Distribution  
25 detailing the amount, allocation and use of the funds to be distributed. Payment shall be deposited



1 with the Registry of the Court in the Commencement Bay Natural Resource Restoration Account  
2 by certified check, bearing the notation "City of Tacoma" and the civil action number assigned to  
3 this Consent Decree, made payable and addressed as follows:

4 Payee: Clerk of the Court  
5 Address: Clerk, U.S. District Court  
6 U.S. Courthouse, Room 215  
1010 Fifth Avenue  
Seattle, WA 98104

7 Memo: For Deposit into the Commencement Bay Natural Resource Restoration Account  
8 C93-5462 [INSERT THIS CASE DOCKET NUMBER]

9 The City shall send photocopies of each check and any transmittal letter to: Chief, Environmental  
10 Enforcement Section, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington,  
11 D.C. 20044; and to NOAA General Counsel - Natural Resources, 7600 Sand Point Way NE, Seattle,  
12 WA 98115-0070.

13 b. The Trustees shall use best efforts to minimize their oversight costs. Any  
14 funds paid pursuant to this Paragraph that are not utilized by Trustees to cover oversight costs may  
15 be used by the Trustees to fund one or more additional restoration projects in the Commencement  
16 Bay Environment.

17 **XVI. PAST COST REIMBURSEMENT**

18 35. The City shall pay the Trustees a total sum of \$227,000 (two hundred twenty-seven  
19 thousand dollars) as reimbursement of a portion of the Trustees' costs of assessing Natural Resource  
20 Damages. Payment shall be made within 45 days following the entry of this Consent Decree by  
21 means of certified checks, bearing the notation "City of Tacoma - Commencement Bay Assessment  
22 Costs" (or an alternate notation as specified below), in the amounts indicated and made payable and  
23 addressed as follows:

24 Trustee: National Oceanic and Atmospheric Administration  
25 Amount: \$92,806.80  
26 Payee: National Oceanic and Atmospheric Administration  
Address: Chief, Damage Assessment Center

1 NOAA, N/ORCAx1  
2 1305 East West Highway, Room 10218  
3 Silver Spring, MD 20910

3 Trustee: U.S. Department of the Interior  
4 Amount: \$43,943.37  
5 Payee: Secretary of the Interior  
6 Alternate  
7 Notation: 14X5198 (NRDAR)  
8 Commencement Bay Nearshore/Tideflats Superfund Site  
9 Address: Chief, Division of Finance  
10 U.S. Fish and Wildlife Service  
11 4401 N. Fairfax Dr., Rm. 380  
12 Arlington, VA 22203

8 Trustee: State of Washington  
9 Amount: \$15,243.61  
10 Payee: State of Washington/Department of Ecology  
11 Address: State of Washington  
12 Department of Ecology  
13 Attention: Cashiering Section  
14 P.O. Box 5128  
15 Lacey, WA 98503-0210

13 Trustee: Puyallup Tribe of Indians  
14 Amount: \$72,856.27  
15 Payee: Puyallup Tribe of Indians  
16 Address: Mr. William Sullivan  
17 Environmental Protection Department  
18 Puyallup Tribe of Indians  
19 2002 E. 28th Street  
20 Tacoma, WA 98404

18 Trustee: Muckleshoot Indian Tribe  
19 Amount: \$2,149.94  
20 Payee: Muckleshoot Indian Tribe  
21 Address: Mr. Rob Otsea  
22 Office of the Tribal Attorney  
23 Muckleshoot Indian Tribe  
24 39015 172nd Avenue S.E.  
25 Auburn, WA 98002

26 XVII. FAILURE TO MAKE TIMELY PAYMENTS

23 36. Payments required under Paragraphs 22.g. and h. (if applicable), 33, 34, 35 and 39  
24 not timely paid and not otherwise excused shall be considered an enforceable judgment for purposes  
25

1 of post judgment collection under Federal Rule of Civil Procedure 69 and other applicable statutory  
2 authority without further order of this Court. In the event that the City fails to make timely payment  
3 of the amounts specified under this Consent Decree, interest shall be assessed at the rate specified  
4 for investments of the Hazardous Substances Superfund established under Subchapter A of Chapter  
5 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42  
6 U.S.C. § 9607(a). The City shall also pay a penalty of 6% per annum on any principal amounts not  
7 paid within 90 days of the due date, which penalty will be charged for the period from the due date  
8 to the date of payment.

9 XVIII. ASSURANCE OF ABILITY TO COMPLETE WORK

10 37. The City shall, within 60 days following the beginning of the calendar quarter  
11 beginning after the date of entry of this Consent Decree, and every 180 days thereafter, submit to the  
12 Trustees a financial report that projects cash flow requirements on a semi-annual basis for the  
13 following year for the Projects, including the amount of funds that will be necessary to pay for all  
14 work related to performing the requirements of this Consent Decree. The projection shall include  
15 a description of the source, amount and type of funding required to pay such costs. If the amount  
16 of funding is less than the amount projected to be needed for the following 180 day period, the City  
17 shall within 90 days of the submittal: (1) Prepare a plan to obtain or otherwise make available  
18 sufficient money to bring the amount of funds available up to the amount projected to be needed for  
19 the 180 days following submittal of the financial report; and (2) submit to the Trustees an updated  
20 financial report that includes a description of the amount and type of all additional funding made  
21 available. The Trustees, by their review and/or approval of financial reports, do not guarantee the  
22 monetary sufficiency of funding obtained or otherwise made available pursuant to this Section, or  
23 the legal sufficiency of any arrangements made to fund the work required by this Consent Decree.  
24 Notwithstanding the requirements of this Section, the City remains fully responsible for all its  
25 obligations under this Consent Decree.

XIX. DISPUTE RESOLUTION

38. The Parties commit their best efforts and the necessary personnel and resources to resolve any disputes that may arise between them. The dispute resolution processes described here are intended to ensure, and the Parties fully commit to, a full and candid discussion of the issues to be resolved by representatives empowered to reach agreement. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between the Parties arising under or with respect to this Consent Decree.

a. The Parties shall attempt to resolve expeditiously and informally any disagreements concerning interpretation or implementation of this Consent Decree. To that end, the signators shall each identify an individual authorized to represent their interests under this Consent Decree. The representatives shall be designated within 60 days of the entry of this Consent Decree and within 10 days of notice of either Informal or Formal Dispute Resolution if the designation is different than any prior designation.

b. If a dispute arises, one or another of the disputing Parties may invoke these provisions by informing the other in writing that a dispute has arisen that requires dispute resolution through Informal Dispute Resolution. Informal Dispute Resolution shall proceed as follows: (i) Within 15 days of the notice of a dispute, the Parties to the dispute shall exchange written statements of issues and all of the information necessary to support their position. (ii) Within 15 days of the exchange, assigned representatives of the Parties shall meet and confer in person. The representatives are to confer with respect to the written statement of issues and seek a resolution of those issues. The assigned representatives are to meet and confer for 15 days, or longer, as agreed among them. (iii) If the issues cannot be resolved, then the representatives will submit to the Parties a joint statement of the issues to be resolved, whether those issues are technical or policy issues, the information presented with respect to each issue, and their recommendations, if any.

1           c.       If Informal Dispute Resolution does not resolve the issues and a Party elects  
2 to pursue further dispute resolution, a Party shall file a notice of Formal Dispute Resolution with  
3 all other Parties within 15 days after the meeting between Party representatives pursuant to  
4 Subparagraph b. above. Formal Dispute Resolution shall then proceed as follows: (i) The disputing  
5 Parties shall use the mediation services of the Judicial Arbitration and Mediation Service of Seattle,  
6 Washington (JAMS). A Mediator shall be chosen by agreement of the representatives from the  
7 panel of available JAMS mediators. If the representatives do not agree or if JAMS mediators are  
8 unavailable, then the Parties shall request the Court to appoint a Mediator. The disputing Parties  
9 may present such information including documents and testimony as they deem appropriate. All  
10 costs of the Mediator shall be split equally among the disputing Parties, and the disputing Parties  
11 agree that they shall not seek to recover their shares of such costs from each other. The foregoing  
12 requirement for the payment or obligation of funds by the United States shall be subject to the  
13 availability of appropriated funds, and no provision of this Consent Decree shall be interpreted to  
14 require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341,  
15 1342. In the event the United States fails to meet its financial obligations to the Mediator, none of  
16 the other disputing Parties shall be liable either to the Mediator or to the United States for such  
17 obligation. (ii) Mediation shall take place for no more than 15 working days following receipt of  
18 the notice of Formal Dispute unless the disputing Parties agree that a longer period is appropriate.  
19 (iii) Within 10 days of the expiration of the formal negotiation period, if resolution has not been  
20 reached, each Party shall issue a written Final Statement of Position on the matter in dispute.

21           d.       An administrative record of any dispute shall be maintained by the Trustees.  
22 The record shall include the statement of issues and information exchanged by the Parties during  
23 both Informal and Formal Dispute Resolution, the written notices of dispute, any relevant documents  
24 generated by any of the disputing Parties or their contractors or agents, any relevant documents  
25 submitted by any of the disputing Parties, any other materials or testimony relied upon by the

1 assigned representatives, and the Final Statements of Position. To ensure that the administrative  
2 record is complete, and to ensure that only those documents considered by the assigned  
3 representatives and the Mediator are included, the disputing Parties shall, within 10 working days  
4 of the beginning of the informal and formal negotiation periods, confer to discuss the documents  
5 proposed for inclusion in the administrative record and the manner of maintaining those records.

6 e. In the event that a petition relating to the dispute is not filed as set forth in  
7 Subparagraph f., the dispute shall be deemed resolved in accordance with the Final Statement of  
8 Position issued by the Trustees and such position shall be deemed effective and binding 15 days  
9 following the receipt by the City or T.P.U. of such Final Statement of Position; provided, however,  
10 such effective date may be extended by the Trustees for good cause shown.

11 f. If the dispute is not resolved through the procedures described in  
12 Subparagraphs a., b., and c. above, the City and T.P.U. shall comply with the Final Statement of  
13 Position issued by the Trustees or, within 15 days of the receipt of the Final Statement of Position  
14 described in Subparagraph c., file a petition with the Court which shall describe the nature of the  
15 dispute and include a proposal for its resolution.

16 g. If the dispute is not resolved pursuant to Subparagraphs a., b. and c. above and  
17 the City or T.P.U. does not file a petition with the Court pursuant to Subparagraph f. above but fails  
18 to perform its obligations under the Consent Decree in accordance with the Final Statement of  
19 Position issued by the Trustees within 30 days after receipt of the Final Statement of Position, the  
20 Trustees may file a Motion to Enforce the Consent Decree with the Court.

21 h. In the event that the City or T.P.U. seeks judicial resolution of the dispute, the  
22 dispute will be reviewed by the Court on the basis of the administrative record. The City or T.P.U.  
23 shall have the burden of proving (1) that the Trustees' decision is arbitrary and capricious or not in  
24 accordance with the objectives of this Consent Decree; and (2) that the City's or T.P.U.'s proposed  
25 resolution will achieve compliance with the terms and conditions of this Consent Decree. Provided,

1 however, where the dispute concerns the issue of whether a power generation facility or comparable  
2 industrial use on properties adjacent to the Hylebos Marsh Project is inconsistent with this Consent  
3 Decree, T.P.U. or the City or their successors and assigns shall have the burden of establishing by  
4 clear and convincing evidence that the facility or use in question will not substantially decrease the  
5 likelihood of success of such Project.

6 i. The City's and T.P.U.'s performance of obligations and payment of liquidated  
7 damages and penalties with respect to a matter on which a dispute has arisen shall be as follows:

8 i. Liquidated damages for compliance delays, penalties and any other  
9 obligations of the City and T.P.U. related to a matter in dispute shall  
10 continue to accrue during the Informal Dispute Resolution Process  
11 described in Subparagraphs a. and b. above and during any period of  
12 judicial resolution initiated by any Party pursuant to Subparagraphs  
13 f. and g. above unless the dispute is ultimately resolved in the City or  
14 T.P.U.'s favor by the Court through judicial resolution or the Trustees  
15 agree to modify the amounts owed or obligations.

16 ii. Liquidated damages for compliance delays, penalties and any other  
17 obligations of the City and T.P.U. related to a matter in dispute shall  
18 not accrue during the Formal Dispute Resolution process described  
19 in Subparagraph c. above.

20 iii. If the City and T.P.U. do not seek judicial resolution of the dispute  
21 pursuant to Subparagraph f. above, they shall pay any accrued  
22 liquidated damages for compliance delays, penalties or other financial  
23 obligations within 45 days after the Trustees issue their Final  
24 Statement of Position. If the City and T.P.U. seek judicial resolution  
25 of the dispute, they shall pay any accrued liquidated damages for

1 compliance delays, penalties or other financial obligations within 45  
2 days of the date the Court issues a decision in favor of the Trustees.

3 j. If the Trustees disagree among themselves regarding the manner of  
4 compliance with this Consent Decree or concerning any issue that is required by the Consent Decree  
5 to be a joint decision of the Trustees, the Trustees shall attempt to resolve any disagreement  
6 expeditiously and informally. If the dispute among the Trustees relates to the performance of a  
7 specific activity or obligation of the City or T.P.U., the City or T.P.U. may suspend performance of  
8 the disputed activity or obligation until the dispute is resolved. Any delay in performance caused  
9 by or attributable to a dispute among the Trustees shall constitute force majeure, and shall not be the  
10 basis for requiring increased assessment cost reimbursements or liquidated damages under Paragraph  
11 39.

12 k. The invocation of dispute resolution procedures under this Paragraph shall  
13 not extend, postpone or affect in any way any obligation of the City or T.P.U. under this Consent  
14 Decree not directly in dispute, unless the Trustees agree or the Court orders otherwise.

15 **XX. COMPLIANCE DELAYS**

16 39. The Parties stipulate that time is of the essence in the implementation of the  
17 requirements of this Consent Decree; that delays in carrying out the activities required herein may  
18 diminish the compensatory value attributable to those activities; that successful projects benefit from  
19 careful planning and design; and that both incentives and disincentives can be used to ensure that  
20 projects are completed as designed and on schedule. Consequently, in the event that the City or  
21 T.P.U. exceeds the deadline provided for one of the activities described below (subject to any  
22 modifications agreed to under Paragraph 60) and such delay is not excused through operation of the  
23 dispute resolution provisions (Paragraph 38) and/or the force majeure provisions (Paragraphs 40 and  
24 41), the City or T.P.U. shall increase the financial contributions it makes under this Consent Decree  
25 toward the Trustees' damage assessment costs or pay liquidated damages to fund further habitat



1 restoration actions, over and above any payments required elsewhere under this Consent Decree, as  
2 follows:

3           a. For each month the City fails to comply with a deadline provided under  
4 Paragraph 21.f. for providing quarterly statements on Project expenditures; under Paragraphs 26 or  
5 27 for providing a proposal or an annual report regarding additional environmental protection efforts;  
6 under Paragraph 28.c., d., or g. for providing an in-kind service plan, a response to an in-kind service  
7 proposal by Trustees, or an annual report regarding in-kind services; under Paragraph 37 for  
8 providing a cash flow projection report or a plan for cash flow shortfall corrective measures; or under  
9 Paragraph 43 for providing copies of certificates of insurance and insurance policies; the City shall  
10 increase by \$1000 (one thousand dollars) its total contributions to reimburse Trustee costs in  
11 assessing Natural Resource Damages. Where the delay extends beyond the first month, the amount  
12 of the reimbursements due under this Subparagraph shall be applied to each additional week or  
13 portion of a week of delay for each document, report or certificate that has not been timely  
14 submitted. Amounts described under this Subparagraph shall accrue until the document, report or  
15 certificate has been submitted, and such amounts shall become due and owing 60 days following  
16 the deadline provided herein for such submittal. Where the delay continues beyond 60 days, the  
17 amount provided shall continue to accrue on a weekly basis and become due and owing at 30-day  
18 intervals until the document, report or certificate has been submitted.

19           b. For each month the City fails to comply with a deadline provided in a Project  
20 Development Schedule included in Appendices A through E for accomplishing a major milestone,  
21 unless excused, on any Project, the City shall pay liquidated damages calculated on the basis of 7.6%  
22 (seven and six-tenths percent) per annum of the aggregate of the Project Expenditures and Project  
23 Contingency Funds allocated to the Project. The amount of liquidated damages shall equal the  
24 following sum per month of delay for each major milestone for each Project:

25                   i. Middle Waterway Project \$5,170

- 1                   ii.     Swan Creek Project \$4,856
- 2                   iii.    Tahoma Salt Marsh Project \$4,650
- 3                   iv.     Hylebos Marsh Project \$2,873
- 4                   v.     Olympic View Resource Area Project \$3,763

5    The amount provided under this Subparagraph shall be applied to each month (and, after the first  
6    month, each portion of an additional month) of delay for each major milestone on which the City  
7    has failed to meet the deadline provided. Such amounts shall become due and owing on a monthly  
8    basis as they accrue. For purposes of this Subparagraph, a month shall equal a continuous period  
9    of 30 days.

10                  c.     Funds payable under this Paragraph either as damage assessment costs  
11    reimbursements or liquidated damages shall be paid in the same manner as provided under Paragraph  
12    34 above for the payment of restoration oversight funds.

13                  d.     The City may dispute the Trustees' right to the funds identified under  
14    Subparagraph a. or b. above by invoking the dispute resolution procedures of Paragraph 38.

15    XXI. FORCE MAJEURE

16                  40.    "Force majeure," for purposes of this Consent Decree, is defined as any event arising  
17    from causes beyond the control of the City or T.P.U., as appropriate, that delays or prevents the  
18    performance of any obligation under this Consent Decree despite the City's or T.P.U.'s best efforts  
19    to fulfill the obligation. The requirement that the City and T.P.U. exercise "best efforts to fulfill the  
20    obligation" includes using best efforts to anticipate any potential force majeure event and best efforts  
21    to address the effects of any potential force majeure event (1) as it is occurring and (2) following the  
22    potential force majeure event, such that the delay is minimized to the greatest extent possible.  
23    "Force majeure" does not include financial inability to fulfill the obligation.

24                  41.    a.     If any event occurs or has occurred that may delay the performance of any  
25    obligation under this Consent Decree, whether or not caused by a force majeure event, the City or

Elizabeth L. Loeb  
U.S. Department of Justice  
Washington, D.C. 20044  
(202) 616-8916

1 T.P.U., as appropriate, shall notify the Trustees within 14 days of when the City or T.P.U. first knew  
2 that the event might cause a delay. Within 30 days thereafter, the City or T.P.U., as appropriate,  
3 shall provide a written explanation and description of the reasons for the delay; the anticipated  
4 duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule  
5 for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the  
6 delay; and the rationale for attributing such delay to a force majeure event, if the City or T.P.U.  
7 intends to assert such a claim. The City or T.P.U. shall include with any notice all available  
8 documentation supporting its claim that the delay was attributable to a force majeure event. Failure  
9 to comply with the above requirements will preclude the City or T.P.U., as appropriate, from  
10 asserting any claim of force majeure for that event.

11           b. If the Trustees agree that the delay or anticipated delay is attributable to a  
12 force majeure event, the time for performance of the obligations under this Consent Decree that are  
13 affected by the force majeure event will be extended by the Trustees for such time as is necessary.  
14 An extension of the time for performance of the obligations affected by the force majeure event shall  
15 not, of itself, extend the time for performance of any other obligation. If the Trustees do not agree  
16 that the delay or anticipated delay has been or will be caused by a force majeure event, the Trustees  
17 will notify the City or T.P.U., as appropriate, in writing of their decision.

18           c. If the City or T.P.U. elects to invoke the dispute resolution procedures set  
19 forth in Paragraph 38, above, regarding a claimed force majeure event they shall do so no later than  
20 30 days after receipt of the Trustees' notice of disagreement. In any such proceeding, the City or  
21 T.P.U. shall have the burden of demonstrating by a preponderance of the evidence that the delay or  
22 anticipated delay has been or will likely be caused by a force majeure event, that the duration of the  
23 delay or the extension sought was or will be warranted under the circumstances, that the City or  
24 T.P.U., as appropriate, exercised best efforts to fulfill the obligation in question, and that the City  
25 or T.P.U. complied with the requirements of this Paragraph. If the City or T.P.U. carries this burden,

1 the delay at issue shall be deemed not to be a violation by the City or T.P.U. of the affected  
2 obligation of this Consent Decree.

3 **XXII. INDEMNIFICATION; INSURANCE**

4 42. a. The City or T.P.U., as appropriate, shall indemnify for and hold harmless each  
5 of the Plaintiffs and/or their agents, employees and representatives from any and all damage claims  
6 or causes of action arising from acts or omissions of the City, T.P.U. and/or their officers,  
7 employees, agents, contractors, subcontractors, representatives and any persons acting on their behalf  
8 or under their control, in carrying out the requirements of this Consent Decree. Further, the City  
9 or T.P.U. as appropriate agree to pay the Plaintiffs all costs they incur, including but not limited to  
10 attorneys fees and other expenses of litigation and settlement, arising from or on account of damage  
11 claims made against the Plaintiffs based on acts or omissions of the City, T.P.U. or their officers,  
12 employees, agents, contractors, subcontractors, representatives and any persons acting on their behalf  
13 or under their control, in carrying out the requirements of this Consent Decree. None of the  
14 Plaintiffs shall be held out as a party to any contract entered into by or on behalf of the City or  
15 T.P.U. in carrying out the requirements of this Consent Decree. Neither the City nor T.P.U. nor any  
16 such contractor or representative shall be considered an agent of any Trustee, and the City and T.P.U.  
17 shall require any contractor carrying out the requirements of this Consent Decree to affirmatively  
18 acknowledge that it is not acting as an agent of any Trustee.

19 b. The City or T.P.U. as appropriate waive, and shall indemnify and hold  
20 harmless the Trustees with respect to, any claims for damages or reimbursement from the Trustees  
21 or for set-off against any payments made or to be made to the Trustees, arising from or on account  
22 of any contract, agreement or arrangement between the City or T.P.U. and any person in carrying  
23 out the requirements of this Consent Decree, including claims on account of construction delays.

24 43. The City shall secure and maintain comprehensive general liability insurance and  
25 automobile liability insurance with limits of \$10,000,000 (ten million dollars), combined single

1 limit. In addition, for the duration of this Consent Decree the City shall satisfy, or shall ensure that  
2 its contractors or subcontractors satisfy, all applicable law and regulations regarding the provision  
3 of worker's compensation insurance for all persons performing any work involved in implementing  
4 this Consent Decree. No later than 15 days before commencing any work involved in implementing  
5 this Consent Decree, the City shall provide to the Trustees certificates of such insurance and a copy  
6 of each insurance policy. The City shall resubmit such certificates and copies of policies each year  
7 on the anniversary of the effective date of this Consent Decree. If the City demonstrates by evidence  
8 satisfactory to the Trustees that any contractor or subcontractor maintains insurance equivalent to  
9 that described above, or insurance covering the same risks but in a lesser amount, then, with respect  
10 to that contractor or subcontractor, the City need provide only that portion of the insurance described  
11 above that is not maintained by the contractor or subcontractor.

12 44. The Trustees agree to require that any contractor who performs work for them in a  
13 Project area shall agree to indemnify and hold harmless the City and T.P.U. and their agents,  
14 employees and representatives, against all claims of any nature, including, but not limited to, claims  
15 by third parties for death, personal injury, or property damage, and claims for environmental liability  
16 that arise as the result of negligent acts or omissions of such contractor, its employees,  
17 representatives and agents in carrying out the provisions of this Consent Decree. Such indemnity  
18 shall be limited to actual damages only, and shall not extend to consequential damages or any other  
19 liability except as stated herein.

20 XXIII. COVENANTS NOT TO SUE

21 45. In consideration of the actions that will be performed by the City and T.P.U. in lieu  
22 of and equivalent to damages, and the payments that will be made by the City in lieu of and  
23 equivalent to damages under the terms of this Consent Decree, and except as specifically provided  
24 in Paragraphs 49, 50, 51, and 52, the Plaintiffs covenant not to sue or to take any other civil or  
25 administrative action against the City or T.P.U. for Covered Matters. These covenants not to sue

1 extend only to the City and T.P.U. and do not extend to any other person.

2 46. The City and T.P.U. covenant not to sue and agree not to assert any claims or causes  
3 of action against any of the Plaintiffs for Covered Matters.

4 47. These covenants not to sue under Paragraphs 45 and 46 and the following reservation  
5 of rights shall take effect upon entry of this Consent Decree by the Court and continue in effect  
6 conditioned upon the satisfactory performance by the City and T.P.U. of their obligations under this  
7 Consent Decree. The determination of satisfactory performance is subject to dispute resolution  
8 under Paragraph 38; these covenants not to sue remain in effect during such dispute resolution.

9 XXIV. RESERVATION OF RIGHTS

10 48. None of the Parties assume any liability by entering into this agreement, except as  
11 expressly stated herein.

12 49. a. Notwithstanding the specification in Paragraph 22.b. of fixed sums for Project  
13 Contingency Funds, as between the Plaintiffs and the City, the City and T.P.U. shall remain liable,  
14 to the extent that they are liable under existing law, or as it may be amended, for the cleanup and/or  
15 remediation of any hazardous substances or for response costs associated therewith, including all  
16 known or subsequently discovered hazardous substances, that remain on, in, under or about each of  
17 the Project sites as of the effective date of the Consent Decree ("Historic Contamination"). The City  
18 and T.P.U. shall remain liable, to the extent noted above, for any monitoring, testing or other  
19 ongoing or future requirements regarding Historic Contamination that either have been, or in the  
20 future may be, imposed through lawful authority.

21 b. The Parties expressly disclaim any intention to effect a transfer to any of the  
22 Plaintiffs of any property interest in the Project sites as a consequence of entering into this Consent  
23 Decree or of any action taken under this Consent Decree. If by operation of law irrespective of the  
24 Parties' intent any property interest is transferred to any of the Plaintiffs pursuant to this Consent  
25 Decree, it is the Parties' intent that such transfer shall not create liability for future cleanup,

1 remediation and/or Natural Resource Damages due to the presence of Historic Contamination as of  
2 the date such property interest is deemed to have transferred.

3 50. The covenants not to sue set forth in Paragraphs 45 and 46 above do not pertain to  
4 any matters other than Covered Matters. Notwithstanding any other provision of this Consent  
5 Decree, the Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against the  
6 City and T.P.U. with respect to all other matters, including but not limited to the following:

7 a. Claims under applicable law seeking to compel the City or T.P.U. to perform  
8 removal or remedial activities, or seeking to recover the costs of removal or remedial activities  
9 including any enforcement activities related thereto (other than those costs paid by the City as  
10 Project Contingency Funds under Paragraph 22.b. in connection with on-site contaminant remedial  
11 action);

12 b. Claims arising from the past, present or future disposal, release or threat of  
13 a release of hazardous substances in areas other than the Commencement Bay Environment;

14 c. Claims for recovery of Natural Resource Damages based on conditions  
15 resulting from a release of hazardous substances after the effective date of this Consent Decree and  
16 that are actionable under any applicable, federal, state or tribal law;

17 d. Claims for criminal liability;

18 e. Liability for violations of applicable federal, state or tribal laws or regulations  
19 (other than Covered Matters) by the City in complying with and implementing this Consent Decree;  
20 or

21 f. Claims brought to enforce the terms of this Consent Decree consistent with  
22 Paragraphs 38 and 51.

## 23 XXV. REOPENERS

24 51. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve,  
25 and this Consent Decree is without prejudice to, the right to institute proceedings against the City

1 and T.P.U. in this action or in a new action for:

2 a. Claims based on a failure of the City and T.P.U. to satisfy requirements of  
3 this Consent Decree, subject to the provisions of Paragraph 38 of this Consent Decree; and

4 b. Additional claims for Natural Resource Damages if conditions, factors or  
5 information in the Commencement Bay Environment, not known to the Trustees at the time of entry  
6 of this Consent Decree, are discovered that, together with any other relevant information, indicates  
7 that there is a threat to the environment, or injury to, destruction of, or loss of natural resources of  
8 a type unknown, or of a magnitude significantly greater than was known, at the time of the entry of  
9 this Consent Decree which are attributable to the City or T.P.U.

10 **XXVI. EFFECT OF SETTLEMENT: CONTRIBUTION PROTECTION**

11 52. Nothing in this Consent Decree shall be construed to create any rights in, or grant any  
12 cause of action to, any person not a party to this Consent Decree. Each of the Parties expressly  
13 reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims,  
14 demands, and causes of action which each Party may have with respect to any matter, transaction,  
15 or occurrence relating in any way to the Commencement Bay Environment against any person not  
16 a party hereto.

17 53. The Parties agree, and by entering this Consent Decree this Court finds, that the City  
18 and T.P.U. are entitled, as of the effective date of this Consent Decree, to protection from  
19 contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2),  
20 and RCW 70.105D.040(4)(d), for Covered Matters.

21 54. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for  
22 injunctive relief, recovery of response costs, or other appropriate relief other than Covered Matters,  
23 the City and T.P.U. shall not assert, and may not maintain, any defense or claim based upon the  
24 principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other  
25 defenses based upon any contention that the claims raised by the Plaintiffs in the subsequent



1 proceeding were or should have been brought in the instant case; provided, however, that nothing  
2 in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraphs 45 and  
3 46

4 55. The Parties hereby stipulate, with the concurrence of EPA, that the terms of this  
5 Consent Decree shall substitute for the collection and presentation of natural resource information  
6 provided by the Administrative Order on Consent for Remedial Design Study In the Matter of Thea  
7 Foss and Wheeler-Osgood Waterways of the Commencement Bay Nearshore/Tideflats Superfund  
8 Site, issued by EPA, March 23, 1994.

9 XXVII. NOTICES AND SUBMISSIONS

10 56. Except as provided otherwise above, whenever, under the terms of this Consent  
11 Decree, written notice is required to be given or a report or other document is required to be sent by  
12 one Party to another, it shall be directed to the individuals at the addresses specified below, unless  
13 those individuals or their successors give notice of a change to the other Parties in writing. All  
14 notices and submissions shall be considered effective upon receipt, unless otherwise provided.  
15 Written notice as specified herein shall constitute complete satisfaction of any written notice  
16 requirement of the Consent Decree with respect to the United States Department of Justice, the  
17 Trustees, the City and T.P.U., respectively.

18 As to the United States Department of Justice

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: DOJ # 90-11-1049A

23 As to the Trustees

24 Dr. Robert Clark  
25 NMFS Restoration Center NW  
26 National Oceanic and Atmospheric Administration

1 7600 Sand Point Way NE  
Seattle, WA 98115-0070

2  
3 Robert A. Taylor  
4 NOAA GC Natural Resources/NW  
7600 Sand Point Way NE  
Seattle, WA 98115-0070

5 Jeff Krausmann DEC/NRDA  
6 U.S. Department of the Interior  
7 Fish and Wildlife Service  
3704 Griffin Lane S.E., Suite 102  
Olympia, WA 98501-2192

8 Fred Gardner  
9 Toxics Cleanup Program  
10 State of Washington  
P.O. Box 47600  
Olympia, WA 98504-7600

11 Bill Sullivan  
12 Environmental Department  
13 Puyallup Tribe of Indians  
2002 East 28th Street  
Tacoma, WA 98404

14 Richard A. DuBey  
15 Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, Washington 98101

16 Robert Otsea  
17 Office of the Tribal Attorney  
18 Muckleshoot Indian Tribe  
39015 172nd Avenue S.E.  
Auburn, WA 98002

19 As to the City and T.P.U.

20  
21 Karen Larkin  
22 Assistant Director  
Public Works Department  
City of Tacoma  
Tacoma Municipal Building  
23 747 Market Street  
Room 420  
24 Tacoma, WA 98402

25 Greg Zentner

26 CONSENT DECREE — Page 47

Elizabeth L. Loeb  
U.S. Department of Justice  
Washington, D.C. 20044  
(202) 616-8916

1 Public Works Department  
Utility Services Engineering Division  
2 2201 Portland Avenue  
Tacoma, WA 98421-27111

3  
4 Robert Betcone  
City Attorney's Office  
747 Market Street  
5 Room 1120  
Tacoma, WA 98402

6  
7 Kevin R. Lyon  
112 E. 4th Avenue  
Suite 200  
8 P.O. Box 10339  
Olympia, WA 98502

9 As to T.P.U.

10  
11 G.S. Karavitas  
Senior Assistant City Attorney  
P.O. Box 11007  
12 Tacoma, WA 98411

13 XXVIII. EFFECTIVE DATE

14 57. The effective date of this Consent Decree shall be the date upon which this Consent  
15 Decree is entered by the Court, except as otherwise provided herein.

16 XXIX. RETENTION OF JURISDICTION

17 58. This Court retains jurisdiction over both the subject matter of this Consent Decree  
18 and the City for the duration of the performance of the terms and provisions of this Consent Decree  
19 for the purpose of enabling any of the Parties to apply to the Court at any time for such further order,  
20 direction, and relief as may be necessary or appropriate for the construction or modification of this  
21 Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in  
22 accordance with Paragraph 38 above.

23 XXX. APPENDICES

24 59. The following appendices are attached to and incorporated into this Consent Decree:

25 Appendix A Middle Waterway Project

- 1 Appendix B Swan Creek Project
- 2 Appendix C Tahoma Salt Marsh Project
- 3 Appendix D Hylebos Marsh Project
- 4 Appendix E Olympic View Resource Area Project
- 5 Appendix F In-Kind Service Rates
- 6 Appendix G Form of real property use restrictions
- 7 Appendix H Form of real property use restrictions notice
- 8 Appendix I Hylebos Marsh Project Impacts Evaluation Criteria

9 XXXI. MODIFICATION

10 60. No material modifications shall be made to any schedule, Project design, deadline  
11 or other requirement under this Consent Decree without written notification to and written approval  
12 of the United States Department of Justice and the Trustees, the City, T.P.U. and the Court.  
13 Modifications to this Consent Decree exclusive of the appendices incorporated within that do not  
14 materially alter the terms of this Consent Decree may be made by written agreement between the  
15 United States Department of Justice, the Trustees and the City or T.P.U., as appropriate.  
16 Modifications to any of the appendices to this Consent Decree that do not materially alter any of the  
17 terms of this Consent Decree may be made by written agreement between the Trustees, the City and  
18 T.P.U., as appropriate. The following modifications shall be deemed not to materially alter the terms  
19 of this Consent Decree or the appendices incorporated herein:

- 20 a. Re-ordering the sequence in which the Projects are constructed;
- 21 b. Extensions of deadlines for Project major milestones, provided that the total  
22 of such extensions shall equal one year or less for each Project;
- 23 c. Project design changes that increase the Project scale, or that decrease the  
24 Project scale by no more than 10% (ten percent) of the Project's area,  
provided one or more of the other Projects is increased in scale so that the  
total area for all Projects is not reduced;
- 25 d. Revisions of annual in-kind service plans;

- 1 e. Extensions of deadlines for reports, accounts, plans or proposals of 45 days  
2 or less; or  
3 f. Substitution of parcels by agreement under the limitations of Paragraph 18.

4 XXXII. ENFORCEMENT

5 61. The requirements of this Consent Decree, including but not limited to deadlines,  
6 schedules and Project designs, are independently enforceable and the delay or failure of the Trustees  
7 to enforce any requirement will not preclude or prejudice the subsequent enforcement of the same  
8 or another requirement.

9 XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

10 62. This Consent Decree shall be lodged with the Court for a period of not less than 30  
11 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C.  
12 § 9622(d)(2), and 28 CFR § 50.7. The Plaintiffs reserve their rights to withdraw or withhold their  
13 consent if the comments regarding the Consent Decree disclose facts or considerations that indicate  
14 that the Consent Decree is inappropriate, improper or inadequate. The City and T.P.U. consent to  
15 the entry of this Consent Decree without further notice.

16 63. If for any reason the Court should decline to approve this Consent Decree in the form  
17 presented, this agreement is voidable at the sole discretion of any Party and the terms of the  
18 agreement may not be used as evidence in any litigation between the Parties.

19 XXXIV. SIGNATORIES/SERVICE


20 64. Each undersigned representative of the Parties certifies that he or she is fully  
21 authorized to enter into the terms and conditions of this Consent Decree and to execute and legally  
22 bind such Party to this document.

23 65. The City and T.P.U. hereby agree not to oppose entry of this Consent Decree by this  
24 Court or to challenge any provision of this Consent Decree unless the Plaintiffs have notified the  
25 City and T.P.U. in writing that they no longer support entry of this Consent Decree.

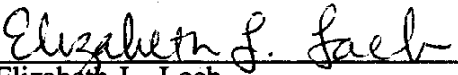


THE UNDERSIGNED SETTLING PARTIES entered into this Consent Decree in the matter of United States, et al., v. City of Tacoma and the Tacoma Public Utility relating to the Commencement Bay Environment.

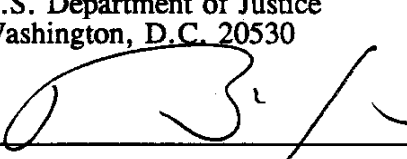
FOR THE UNITED STATES OF AMERICA

By:   
Lois J. Schiffer  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Dated: 4/27/97

By:   
Elizabeth L. Loeb  
Attorney  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

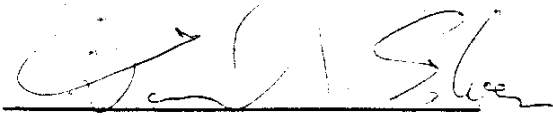
Dated: 4/30/97

By:   
Assistant United States Attorney  
3600 SeaFirst Fifth Avenue Plaza  
500 Fifth Avenue  
Seattle, WA 98104

Dated: 5/28/97

1 THE WASHINGTON DEPARTMENT OF ECOLOGY

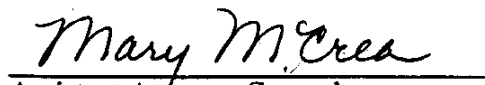
2  
3 By:

  
\_\_\_\_\_

Dated:

12/23/96

4  
5 By:

  
\_\_\_\_\_  
Assistant Attorney General  
State of Washington

Dated:

1/3/97



1 THE PUYALLUP TRIBE OF INDIANS

2

3 By:

Michael R. Howell

Dated:

October 30, 1996

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CONSENT DECREE

Elizabeth L. Loeb  
U.S. Department of Justice  
Washington, D.C. 20044  
(202) 616-8916

1 THE MUCKLESHOOT INDIAN TRIBE

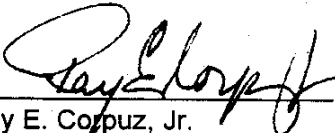
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By: Virginia Cox

Dated: 1-14-97

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THE CITY OF TACOMA

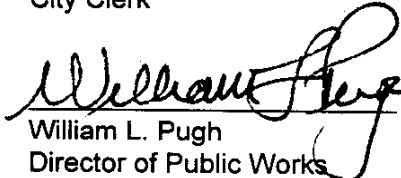
By:   
Ray E. Corpuz, Jr.  
City Manager

Dated: 1-6-97

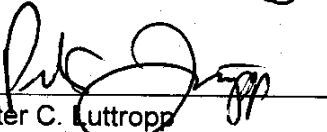
Attest:

By:   
Rick Rosenblatt  
City Clerk

Dated: 1-6-97

By:   
William L. Pugh  
Director of Public Works

Dated: 12/18/96

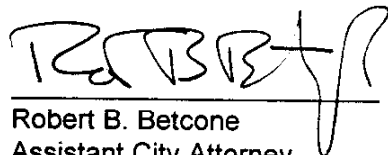
By:   
Peter C. Luttrupp  
Director of Finance

Dated: 1/6/97

By:   
Andrew A. Michels  
Risk Management

Dated: 1/4/97

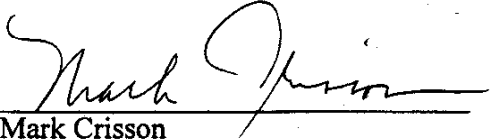
Approved as to form

  
Robert B. Betcone  
Assistant City Attorney

Dated: 12/18/96


For matters arising under, or relating to, this Consent Decree, service may be made on the City Attorney or an Assistant City Attorney, 747 Market Street, Suite 1120, Tacoma, WA 98402; Telephone number: (206) 591-5885

1 THE TACOMA PUBLIC UTILITIES

2  
3 By:   
4 Mark Crisson  
Director

Dated: 9 JAN 1997

5 Approved as to form:

6  
7   
8 Steven Karavitas  
Senior Assistant City Attorney

Dated: 7 JAN 1997

9 For matters arising under or relating to this Consent Decree, service may be made on  
10 any Assistant City Attorney at the City Attorney's Office at Tacoma  
11 Public Utilities, P.O. Box 11007, Telephone number: (206) 502-8331  
12 Tacoma, WA 98411.