

1                   XXII. COVENANTS NOT TO SUE BY PLAINTIFFS

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

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

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

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

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

18 80. Post-certification reservations. Notwithstanding any  
19 other provision of this Consent Decree, the United States and the  
20 Natural Resource Trustees reserve, and this Consent Decree is  
21 without prejudice to, the right to institute proceedings in this  
22 action or in a new action, or to issue an administrative order  
23 seeking to compel Settling Defendant (1) to perform further  
24

25  
26 Thomas W. Swegle  
27 WA Bar Number 15667  
28 SITCUM WATERWAY U.S. Department of Justice  
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1 response actions relating to the Site if, subsequent to  
2 certification of completion of the Remedial Action:

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

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

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

25  
26 Thomas W. Swegle  
27 WA Bar Number 15667  
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1 EPA pursuant to the AOC. For purposes of Paragraph 80, the  
2 information and the conditions known to Plaintiffs shall include  
3 only that information and those conditions set forth in the  
4 Record of Decision, the administrative record supporting the  
5 Record of Decision, and any information received and approved by  
6 EPA pursuant to the requirements of the AOC and this Consent  
7 Decree prior to Certification of Completion of the Remedial  
8 Action. As regards Natural Resource Damages, for purposes of  
9 Paragraphs 79 and 80, the injury to, destruction of, or loss of  
10 natural resources known shall include those addressed by the  
11 Preassessment Screen issued by the Natural Resource Trustees on  
12 or about October 29, 1991.

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

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

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

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

6 (4) criminal liability;

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

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

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

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

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

7 XXIII. COVENANTS BY SETTLING DEFENDANT

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

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

11 XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

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

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



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

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

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

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

1 XXV. ACCESS TO INFORMATION

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

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

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

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

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

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

3 XXVI. RETENTION OF RECORDS

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

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

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

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

1 XXVII. NOTICES AND SUBMISSIONS

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

18 As to the United States:

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

26 and

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

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

4 As to EPA:

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

8 As to the Settling Defendant:

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

12 As to the Lead Natural Resource Trustee:

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

16 As to the State:

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

20 XXVIII. EFFECTIVE DATE

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

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1 Appendix E - Wasser & Winters Property

2 Appendix F - Option to Buy Real Property

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4 XXXI. COMMUNITY RELATIONS

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

16 XXXII. MODIFICATION

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

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

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26 WA Bar Number 15667  
27 U.S. Department of Justice  
28 Evt. Enforcement, P.O. Box 7611  
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1           XXXIII.   LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

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

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

16                           XXXIV.   SIGNATORIES/SERVICE

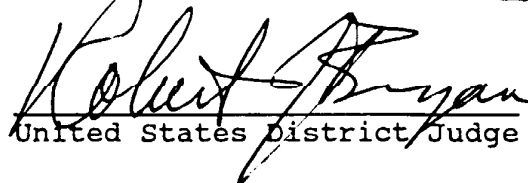
17          106.   The undersigned representative of Settling Defendant to  
18 this Consent Decree, the Assistant Attorney General for  
19 Environment and Natural Resources of the Department of Justice,  
20 and the undersigned representative for each of the other Natural  
21 Resource Trustees certifies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

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

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

15  
16 Presented By: Thomas W. Swegle

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

18  
19   
United States District Judge

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

4 FOR THE UNITED STATES OF AMERICA

5  
6 Date: 8/11/93

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

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

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

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

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

2

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

6

7

FOR THE PORT OF TACOMA

8

9

Date: 6-1-93

Jack G. Falukid

10

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12

13

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

14

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

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SITCUM WATERWAY  
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1 THE WASHINGTON DEPARTMENT OF ECOLOGY

2

Mary Lindland

Dated: 6/4/93

3

4

The Washington Department of Ecology

5

Tanya Barnett

Dated: 3 June 1993

6

Tanya Barnett  
Assistant Attorney General  
State of Washington

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

1 THE PUYALLUP TRIBE OF INDIANS

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Thomas W. Swegle

Dated: 4/30/93

SITCUM WATERWAY  
CONSENT DECREE - PAGE 112

Thomas W. Swegle  
WA Bar Number 15667  
U.S. Department of Justice  
Envt. Enforcement, P.O. Box 7611  
Washington, D.C. 20044  
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1 THE MUCKLESHOOT INDIAN TRIBE

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*Virginia Crow*

Dated: JUL 26 1995

SITCUM WATERWAY  
CONSENT DECREE - PAGE 113

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

Hon. Robert J. Bryan

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

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
ENTERED  
ON DOCKET

*cf/Financed*

OCT 8 1993  
By Deputy

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

Civil No. C93-5462B

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

Plaintiffs,

v.

PORT OF TACOMA

Defendant

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

ORDER DIRECTING DEPOSIT OF  
NATURAL RESOURCE DAMAGES - 1

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

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

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

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

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ORDER DIRECTING DEPOSIT OF  
NATURAL RESOURCE DAMAGES - 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

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

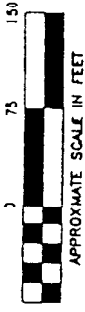
17  
18 Dated 8 October 1993

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

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APPENDIX E  
Wasser & Winters Property





MARINE VIEW DRIVE  
 N 01°57'22" W  
 305.16'

TOP WEST RAIL  
 N 01°57'22" W  
 305.16'

POINT OF SURFACE WATER DISCHARGE  
 S 70°45'35" E 639.50' (639.91')

APPROXIMATE LIMITS OF ASPHALT CAP. FINAL CONFIGURATION TO BE DETERMINED BASED ON CLEAN-UP NEEDS. LINE MAY VARY FROM 25 TO 50 FEET.

APPROXIMATE PAVEMENT ELEVATION 18.0-21.5 FEET

INLET STRUCTURE  
 INLET STRUCTURE

Possible area of habitat to be developed by Trustees.

APPROXIMATE CLEAN UP AREA WITH HIGH WATER RISES. 15 FEET BEFORE AND AFTER CONSTRUCTION

DISTURBANCE BARRIER

TOTAL AREA OF DISTURBANCE BARRIER IS APPROXIMATELY 3.164 ACRES.



**PORT OF TACOMA**  
 P.O. BOX 1837 TACOMA, WA 98401  
 (206) 383-5841

**WASSER WINTERS SITE  
 PARCEL 47  
 PROPOSED PLAN**

DWG: SMA047.DWG  
 DATE: 3-30-93  
 DRAWN BY: OAH  
 CHECKED BY: CLR

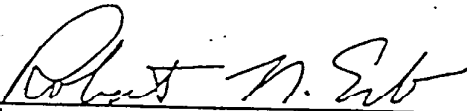
Description for Disturbance Barrier  
on Port of Tacoma Parcel 47

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

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

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

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



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

April 3, 1993  
Project No. 7526

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

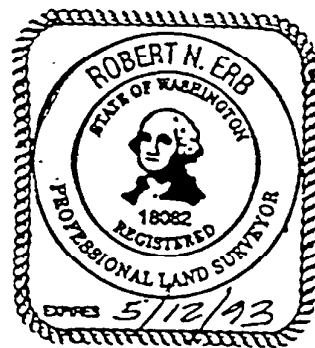


EXHIBIT E

APPENDIX F  
Option to Buy Real Property

OPTION TO BUY PROPERTY

NATURAL RESOURCE TRUSTEE  
(Optionee)

PORT OF TACOMA  
(Optionor)

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

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

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

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

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

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

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

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

9. Notice

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

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

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

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

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

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

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

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

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

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
OPTIONOR

OPTIONEES

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

I hereby certify that I know or have satisfactory evidence that

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

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

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

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

RJG:ramborsie  
OptProp  
6/4/93