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SEATTLE

AUG 17 1993

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

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AUG 16 1993

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

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

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

C93 - 5462

Civil No.

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

SITCUM WATERWAY  
CONSENT DECREE

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 II. JURISDICTION

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

14 III. PARTIES BOUND

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

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

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

15 IV. DEFINITIONS

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 "State" shall mean the State of Washington.

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

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

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

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



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

4 V. GENERAL PROVISIONS

5 5. Objectives of the Parties

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

13 6. Commitments by Settling Defendant

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

1        7. Compliance With Applicable Law

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

12        8. Permits

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

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

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

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

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

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

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

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

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

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

3 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

4 10. Selection of Supervising Contractor.

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

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

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

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

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

17 11. Remedial Design.

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

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

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

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

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

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

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

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

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

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

13 13. Remedial Action.

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

1 into an agreement or agreements to obtain permanent use and  
2 occupation of property owned by the State of Washington and  
3 managed by the Washington Department of Natural Resources that is  
4 needed for implementation of the Work at and beyond the mouth of  
5 the Milwaukee Waterway. Settling Defendant shall dedicate in  
6 perpetuity the property it owns, and property it leases from or  
7 otherwise obtains control of from the Washington Department of  
8 Natural Resources at and beyond the mouth of the Milwaukee  
9 Waterway and at the Additional Mitigation Project (as described  
10 in the Remedial Design documents approved by EPA under the AOC  
11 and the Consent Decree) as habitat to be maintained and monitored  
12 in accordance with the OMM Plan, as approved by EPA, except as  
13 ordered by the Court upon petition by the Parties. The Settling  
14 Defendant's commitment to dedicate property in perpetuity does  
15 not impose an obligation on the Washington Department of Natural  
16 Resources. The Settling Defendant shall commence the approved  
17 Remedial Action within thirty (30) days after EPA direction, in  
18 writing, to proceed, or at some later date as agreed to by EPA  
19 and the settling Defendant.

20 b. Unless otherwise directed by EPA, Settling Defendant  
21 shall not commence physical on-site remedial activities at the  
22 Site prior to both EPA approval of the relevant Remedial Design  
23 documents under the AOC and EPA direction, in writing, to proceed  
24 with the remedial activities. Furthermore, unless otherwise

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

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

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

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

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

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

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

7                           VII. ADDITIONAL RESPONSE ACTIONS

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

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

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

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

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

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

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

11 VIII. EPA PERIODIC REVIEW

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

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



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

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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

1 IX. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

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

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

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

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

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

11 X. ACCESS

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

21 a. Monitoring the Work;

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

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

3 d. Obtaining samples;

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

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

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

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

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

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

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

22 | XI. REPORTING REQUIREMENTS

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

25 |  
26 | Thomas W. Swegle  
27 | WA Bar Number 15667  
28 | U.S. Department of Justice  
29 | Env't. Enforcement, P.O. Box 7611  
30 | Washington, D.C. 20044  
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