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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, ON BEHALF OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AND THE UNITED STATES DEPARTMENT OF THE INTERIOR; STATE OF WASHINGTON THROUGH THE WASHINGTON DEPARTMENT OF ECOLOGY; PUYALLUP TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE, Plaintiffs, v. THE CITY OF TACOMA AND THE TACOMA PUBLIC UTILITY Defendants.	CIVIL NO. C97-5336 RJ CONSENT DECREE

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I. INTRODUCTION

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

II. RECITALS

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

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

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

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

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

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Environment.

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

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

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

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

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

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

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

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

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

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

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

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

a. Middle Waterway Property (as detailed in Appendix A): $384,258.

b. Swan Creek Property (as detailed in Appendix B): $231,154.

c. Tahoma Salt Marsh Property (as detailed in Appendix C): $574,338.

d. Hylebos Marsh Property (as detailed in Appendix D): $1,377,000.

e. Olympic View Resource Area Property (as detailed in Appendix E): $155,068.

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

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

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

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

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

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

III. JURISDICTION AND VENUE

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

IV. PARTIES BOUND

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

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and legally bind the respective party to this Consent Decree.

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

V. DEFINITIONS

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

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

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

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

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

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

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

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

VI. GENERAL PROVISIONS

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

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

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

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

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

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

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

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

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

VII. LAND ACQUISITION AND DEDICATION

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

i. Middle Waterway Project (as detailed in Appendix A)

ii. Swan Creek Project (as detailed in Appendix B)

iii. Tahoma Salt Marsh Project (as detailed in Appendix C)

iv. Hylebos Marsh Project (as detailed in Appendix D)

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v. Olympic View Resource Area Project (as detailed in Appendix E)

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

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

i. Middle Waterway Project (west parcel) (as detailed in Appendix A)

ii. Hylebos Marsh Project (as detailed in Appendix D); T.P.U. anticipates but is not obliged to create a separate parcel for the Hylebos Marsh Project

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

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

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

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

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

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

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

VIII. RESTORATION AND REHABILITATION PROJECTS

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

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

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

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a. Apply for and use best efforts to obtain and comply with all applicable permits required under relevant federal, tribal, state or local laws and ordinances;

b. Complete the acquisition of real property, the securing of property use rights and the creation and recording of deed restrictions or other legal instruments as appropriate for each of the Projects as described in Paragraphs 14 through 16 above;

c. Construct or have constructed the Project in accordance with the applicable Project Construction Plan;

d. Maintain the Project in accordance with the applicable Project Maintenance Plan;

e. Monitor and evaluate the Project, and, subject to Paragraph 22.g. below, take such adaptive management actions as agreed to or required by the Trustees, in accordance with the applicable Project Monitoring and Adaptive Management Plan;

f. Provide to the Trustees, within 60 days following the end of each quarter (i.e., by May 30, August 29, November 29, and March 1), quarterly statements and such supporting documentation and accounting as the Trustees shall determine necessary regarding the costs incurred relative to the Project (including, where applicable, costs for maintenance and adaptive management). Costs incurred prior to the effective date of this Consent Decree may be submitted with either of the first two quarterly statements due after the effective date;

g. Provide to the Trustees the Project Completion Accounting as required under Paragraph 22.f.; and

h. Avoid taking or permitting another to take any action on the Project site property or on adjacent properties owned or controlled by the City or T.P.U. that is inconsistent with this Consent Decree and that will interfere with the Project such that it will substantially decrease the likelihood of success of the Project. The Parties agree that the current actions by the City and T.P.U. on adjacent properties are not inconsistent with this Consent Decree. The Parties further

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

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

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

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

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

i. Middle Waterway Project $702,050

ii. Swan Creek Project $721,100

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iii. Tahoma Salt Marsh Project $642,800

iv. Hylebos Marsh Project $362,204

v. Olympic View Resource Area Project $479,975

b. Project Contingency Funds shall cover only the reasonable and necessary costs of construction cost-overruns, change orders, contaminant source control activities, on-site contaminant removal or remedial action, and adaptive management actions in accordance with the Project Monitoring and Adaptive Management Plan, as agreed to or required by the Trustees. Project Contingency Funds may include the costs of acquiring, dedicating or securing the right of use of or substituting real property only for the Middle Waterway Project and/or the Olympic View Project, totaling no more than $97,000, incurred between August 1, 1996 and one year after the effective date of this Consent Decree, as agreed to by the Trustees. Total Project Contingency Funds shall equal $456,800 (four hundred fifty-six thousand eight hundred dollars) for all Projects, allocated as follows:

i. Middle Waterway Project $114,200

ii. Swan Creek Project $45,680

iii. Tahoma Salt Marsh Project $91,360

iv. Hylebos Marsh Project $91,360

v. Olympic View Resource Area Project $114,200

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. POST-CONSTRUCTION ALTERATIONS; FURTHER RESTORATION ACTIONS

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

X. ENVIRONMENTAL PROTECTION EFFORTS

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

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protective regulatory authorities are aggressively applied and implemented as follows:

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

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

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

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

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

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

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

XI. IN-KIND SERVICES

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

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

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

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subject to Trustee prior approval.

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

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

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

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

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

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

XII. ACCESS TO INFORMATION AND PROJECT SITES

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

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

a. Monitoring and assessing progress on the planning, development, maintenance and monitoring of the Projects;

b. Verifying any data or information submitted to the Trustees;

c. Inspecting and copying records, operation logs, contracts or other documents maintained or generated by the City or its agents or contractors for the work undertaken pursuant to this Consent Decree;

d. Conducting such tests, investigations or sample collections as deemed necessary to monitor compliance with this Consent Decree or to assist in further identifying and quantifying natural resource injuries requiring restoration actions and in planning and carrying out further restoration actions;

e. Using a camera, sound recording device or other type equipment to record the work done under this Consent Decree or injury to natural resources;

f. Undertaking any maintenance action the Trustees determine necessary; and

g. Undertaking post-construction alterations or further restoration actions in accordance with Paragraph 23.

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

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XIII. SELECTION OF CONTRACTORS

32. The selection of any contractor retained by the City to perform any of the work required under this Consent Decree shall be subject to Trustee approval. The City shall notify the Trustees in writing of the name, title and qualifications of any proposed contractor, and of any proposed changes in the selection of a contractor. The Trustees will notify the City in writing of the approval or disapproval of a proposed contractor. The City shall also notify the Trustees of any proposed subcontractor and of any proposed changes in the selection of a subcontractor to be retained to perform any of the work required under this Consent Decree. The Trustees' assent to the proposed selection or change of a subcontractor may be presumed unless the Trustees notify the City in writing of their objection to the proposed selection or change within 45 days of the City's written selection notice.

XIV. TRIBAL TRUSTEE TECHNICAL SUPPORT

33. The City shall provide funding to the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe in an amount totaling $500,000 (five hundred thousand dollars) to support Tribal government programs for the planning and implementation of habitat restoration and other activities related to the conservation, protection and enhancement of natural resources of the Commencement Bay Environment. The costs covered by this Paragraph include staff salary, benefits and indirect support costs; travel costs; materials and supplies; and payments for goods and services.

a. The funds provided under this Paragraph shall be paid in payments of $50,000 (fifty thousand dollars) each to the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe with the first such payment to be made within 45 days after entry of this Consent Decree. Subsequent payments shall be made by October 1 of each year beginning with October 1, 1997 and ending with October 1, 2000. Payment shall be by certified check, noting "City of Tacoma NRDA - Technical Support," made payable and addressed as provided for each tribe respectively below in Paragraph 35.

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

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

XV. REIMBURSEMENT OF RESTORATION OVERSIGHT COSTS

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

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

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

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

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

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

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

XVI. PAST COST REIMBURSEMENT

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

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

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

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

Trustee: State of Washington
Amount: $15,243.61
Payee: State of Washington/Department of Ecology
Address: State of Washington
Department of Ecology
Attention: Cashiering Section
P.O. Box 5128
Lacey, WA 98503-0210

Trustee: Puyallup Tribe of Indians
Amount: $72,856.27
Payee: Puyallup Tribe of Indians
Address: Mr. William Sullivan
Environmental Protection Department
Puyallup Tribe of Indians
2002 E. 28th Street
Tacoma, WA 98404

Trustee: Muckleshoot Indian Tribe
Amount: $2,149.94
Payee: Muckleshoot Indian Tribe
Address: Mr. Rob Otsea
Office of the Tribal Attorney
Muckleshoot Indian Tribe
39015 172nd Avenue S.E.
Auburn, WA 98002

XVII. FAILURE TO MAKE TIMELY PAYMENTS

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

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

XVIII. ASSURANCE OF ABILITY TO COMPLETE WORK

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

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XIX. DISPUTE RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XX. COMPLIANCE DELAYS

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

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

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

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

i. Middle Waterway Project $5,170

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ii. Swan Creek Project $4,856

iii. Tahoma Salt Marsh Project $4,650

iv. Hylebos Marsh Project $2,873

v. Olympic View Resource Area Project $3,763

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

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

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

XXI. FORCE MAJEURE

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

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

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

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

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

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

XXII. INDEMNIFICATION; INSURANCE

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

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

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

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

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

XXIII. COVENANTS NOT TO SUE

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

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

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

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

XXIV. RESERVATION OF RIGHTS

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

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

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

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

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

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

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

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

d. Claims for criminal liability;

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

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

XXV. REOPENERS

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

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

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

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

XXVI. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

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

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

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

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

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

XXVII. NOTICES AND SUBMISSIONS

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

As to the United States Department of Justice

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DOJ # 90-11-1049A

As to the Trustees

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

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7600 Sand Point Way NE
Seattle, WA 98115-0070

Robert A. Taylor
NOAA GC Natural Resources/NW
7600 Sand Point Way NE
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Jeff Krausmann DEC/NRDA
U.S. Department of the Interior
Fish and Wildlife Service
3704 Griffin Lane S.E., Suite 102
Olympia, WA 98501-2192

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

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

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

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

<u>As to the City and T.P.U.</u>

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

Greg Zentner

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

Robert Betcone
City Attorney's Office
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Room 1120
Tacoma, WA 98402

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

As to T.P.U.

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

XXVIII. EFFECTIVE DATE

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

XXIX. RETENTION OF JURISDICTION

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

XXX. APPENDICES

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

Appendix A Middle Waterway Project

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Appendix B Swan Creek Project

Appendix C Tahoma Salt Marsh Project

Appendix D Hylebos Marsh Project

Appendix E Olympic View Resource Area Project

Appendix F In-Kind Service Rates

Appendix G Form of real property use restrictions

Appendix H Form of real property use restrictions notice

Appendix I Hylebos Marsh Project Impacts Evaluation Criteria

XXXI. MODIFICATION

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

a. Re-ordering the sequence in which the Projects are constructed;

b. Extensions of deadlines for Project major milestones, provided that the total of such extensions shall equal one year or less for each Project;

c. Project design changes that increase the Project scale, or that decrease the Project scale by no more than 10% (ten percent) of the Project's area, provided one or more of the other Projects is increased in scale so that the total area for all Projects is not reduced;

d. Revisions of annual in-kind service plans;

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e. Extensions of deadlines for reports, accounts, plans or proposals of 45 days or less; or

f. Substitution of parcels by agreement under the limitations of Paragraph 18.

XXXII. ENFORCEMENT

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

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

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

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

XXXIV. SIGNATORIES/SERVICE

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

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

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

66. The City and T.P.U. shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of the City and T.P.U. with respect to all matters arising under or relating to this Consent Decree. The City and T.P.U. hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS 30 DAY OF Dec, 1997.

United States District Judge

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

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

FOR THE UNITED STATES OF AMERICA

By: _____ Dated: 4/27/97

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

By: Elizabeth L. Loeb Dated: 4/30/97

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

By: _____ Dated: 5/28/97

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

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

THE WASHINGTON DEPARTMENT OF ECOLOGY

By: _____ Dated: 12/23/96

By: Mary M. Crea Dated: 1/3/97
Assistant Attorney General
State of Washington

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

THE PUYALLUP TRIBE OF INDIANS

By: Michael P. Connell Dated: October 31, 1996

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

THE MUCKLESHOOT INDIAN TRIBE

By: Virginia Cross Dated: 1-14-97

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

ORIGINAL

THE CITY OF TACOMA

By: _____ Dated: 1-6-97
Ray E. Corpuz, Jr.
City Manager

Attest:

By: _____ Dated: 1-6-97
Rick Rosenbladt
City Clerk

By: _____ Dated: 12/18/96
William L. Pugh
Director of Public Works

By: _____ Dated: 1/6/97
Peter C. Luttropp
Director of Finance

By: _____ Dated: 1/6/97
Andrew A. Michels
Risk Management

Approved as to form

_____ Dated: 12/18/96
Robert B. Betcone
Assistant City Attorney

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

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

THE TACOMA PUBLIC UTILITIES

By: _____ Dated: 9 JAN 1997
Mark Crisson
Director

Approved as to form:

_____ Dated: 7 JAN 1997
Steven Karavitas
Senior Assistant City Attorney

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

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