

Return to  
King County

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**FUNDING AGREEMENT**

THIS AGREEMENT (the "Agreement") is made by and between King County, a political subdivision of the State of Washington, the King County Flood Control Zone District, a quasi-municipal corporation of the State of Washington, and Advance Ross, Hygrade, BNSF Railway Company, Carstens Company, City Waterway Investments, Inc., ConocoPhillips Company, F.S. Harmon, Globe Machine Manufacturing Co., Gull Industries, Inc., J.M. Martinac Shipbuilding Corporation, Louisiana-Pacific Corporation, McFarland Cascade (Cascade Pole), Menasha Corporation, Moorage Associates, LLC, Nestle USA, Inc., NuStar, OfficeMax Incorporated, OMYA, PacifiCorp Environmental Remediation Co., Puget Sound Energy, Rainier Plywood Co. (Rainier Richlite Co.), Johnson Postman Company, Shore Terminals, SuperValu, Inc., The Boeing Company, The DIL Trust, The Jack Morris Estate, The Wattles Company, Truck-Rail Handling, Inc., Union Pacific Railroad, Washington Floral Service, Inc., WA Department of Transportation, and Woodworth & Company, Inc., hereinafter collectively referred to as the "Contributing Parties."

Recitals

Whereas, King County and the King County Flood Control Zone District ("District") are both authorized under Washington State law to undertake projects that provide flood protection and ecological benefits; and

Whereas, King County and the District jointly sponsor such projects, with the District providing funding for such projects and King County being fully responsible for implementing the project through design, construction, maintenance, repair and monitoring of such projects; and

Whereas, King County and the District (hereinafter collectively referred to as the "County") agree that they are to be jointly and severally responsible for carrying out the obligations of this Agreement, unless one or the other is referred to singularly as either "King County" or the "Flood District"; and

Whereas, the County is the owner of certain parcels of real property, and/or is in the process of acquiring approximately 115.1 acres of real property interests located in King County and Pierce County, Washington, as described in **Exhibit 1** attached hereto and incorporated herein by this reference as Exhibit 1, which also constitutes Appendix E-1 to the Consent Decree, as further described herein ("Project Property"); and

Whereas, the County seeks to improve natural resources at the Project Property, including salmonid habitat, and provide flood control, as generally described and depicted in **Exhibit 2**,

attached hereto and incorporated herein by this reference (the "Project"), which also constitutes Appendix A to the Consent Decree, as further described herein; and

Whereas, the County has or will acquire all property interests necessary for construction, operation and maintenance of the Project and will be fully responsible for design, permitting, construction, operation, and maintenance of the Project (collectively referred to herein as the "performance of the Project"); and

Whereas, the County has cooperated with various tribes and federal and state agencies with regard to the pre-design of the Project, has secured or will secure public funding to pay a portion of the cost of the Project, has completed 60% design plans, is in the process of issuing a Request for Proposals for engineering services to complete design and plans and specifications of the Project, will obtain all local, state and federal permits necessary for the Project, and is making every reasonable effort to proceed with the start of construction of the Project in 2015, but which shall in no event occur later than by May 2016 (i.e. May 31, 2016); and

Whereas the County is seeking additional financial contributions to significantly reduce the public funding needed for the Project; and

Whereas, the Commencement Bay Natural Resource Trustees (the "Trustees") have asserted claims against the Contributing Parties - and others - under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for Natural Resource Damages ("NRD") related to historical contamination of the Thea Foss and Wheeler-Osgood Waterways (collectively, the "Waterway") on Commencement Bay in Tacoma, Washington; and

Whereas, the Contributing Parties wish to resolve their potential liability to the Trustees for NRD claims related to the Waterway, in part, by contracting with the County for performance of the Project; and

Whereas, it is anticipated that the Project will provide benefit to natural resources, for which the Contributing Parties wish to obtain credit, measured in or calculated as habitat, resource or wetlands restoration, mitigation, or preservation credits (collectively referred to herein as "Discounted Service Acre Years (DSAY) Credit"); and

Whereas, the Trustees have provisionally agreed to the terms of the Consent Decree, as further described herein, which would, upon execution and entry by the United States District Court, provide an acceptable DSAY Credit for the Project and resolve the Contributing Parties' NRD liabilities; and

Whereas, the Contributing Parties, in collaboration with King County, have negotiated the form of the Consent Decree with the Trustees and expect it to be entered in United States District Court in 2014;

#### Mutual Covenants

NOW, THEREFORE, for and in consideration of mutual benefits and in further consideration of the general public welfare, and of the peculiar and special benefits and

advantages to accrue therefrom, receipt of which is acknowledged, the County and the Contributing Parties agree as follows:

1. **Conditional Agreement to Fund Construction.** Contributing Parties agree to pay to County \$4,775,000.00 (Four Million Seven Hundred Seventy-Five Thousand Dollars) to fund construction of the Project, expressly conditioned upon the entry of a consent decree substantially in the form of **Exhibit 3** hereto (“Consent Decree”) and the expiration of any appeal period as described in Paragraph 6 below. Further conditions and terms are provided for below.
2. **Agreement that Contributing Parties Will Receive all Environmental Credit.** The County agrees that in exchange for the payment of the amount identified in Paragraph 1 above, the Contributing Parties will receive all DSAY Credit for this Project, and that no other entity shall own or assert any claim for DSAY Credits arising from the Project; that the Contributing Parties may apply these DSAY Credits to resolve their potential liability for NRD claims; as well as the potential liability of other parties for NRD claims; and/or, any other use relating to environmental or habitat preservation, restoration, or mitigation, as determined by the Contributing Parties. Contributing Parties and the County agree to cooperate with one another to take those reasonable actions necessary to finalize a design and construct the Project in a way that obtains maximum DSAY Credit for the Project from the Trustees.
3. **Performance of the Project.** The County agrees to acquire all property necessary for the Project, and to design, permit, construct, operate and maintain the Project in accordance with Exhibit 2 to this Agreement. The County agrees to exercise its best efforts to acquire all property necessary for Project completion by no later than December, 2015 (i.e. December 31, 2015). The County further agrees to complete design and permitting for the Project by December 31, 2014 and to commence construction of the Project by no later than May, 2016 (i.e. May 31, 2016). The County agrees that as long as the funding referred to in Paragraph 1 above is received by the County by May 1, 2015 the County will complete construction of the Project by no later than December, 2017 (i.e., December 31, 2017). The County will be the only party responsible for acquiring property necessary for the Project, and for designing, permitting, constructing, operating and maintaining the Project. At the request of the Contributing Parties, the County will make documents related to the design, permitting, construction, operation and maintenance of the Project available to the Contributing Parties and Trustees, including documentation of project costs as required by Section VIII of the Consent Decree. The County will accommodate reasonable insurance and indemnity requests by the Trustees and the Contributing Parties, as reflected in Section XX of the Consent Decree, in its contracts with its contractors designing or constructing the Project. In the event that the entry of the Consent Decree is delayed beyond July 1, 2015, and this Agreement is not terminated pursuant to Paragraph 7 below, then dates for property acquisition, permitting, and beginning and completing construction shall each be extended an additional year. If further delays occur, and this Agreement is not terminated pursuant to Paragraph 7 below, then dates for property acquisition and beginning and completing construction shall be extended an additional year for each year for which the Consent Decree is delayed in being entered beyond July 1, 2015.

- 3.1 The County will retain ownership or control and responsibility for all short-term and long-term operation and maintenance of the Project. King County will cooperate and execute, or cause to be executed, and to record any necessary easements or deed restrictions with regard to the operation and maintenance of the Project as reasonably required by the Trustees in the Consent Decree, including covenants and easements substantially in the form of **Exhibit 4** hereto, which also constitutes Appendices E-2 and E-3 to the Consent Decree, and to allow access to the Project as may be required by the Trustees in the Consent Decree to the extent not inconsistent with the flood control objectives of the County. The Contributing Parties will not have any responsibility for any aspects of the Project, other than to provide the funding identified in Section 1 above.
- 3.2 The County agrees to defend, indemnify, and hold harmless all Contributing Parties, individually and collectively, from and against any and all claims by the Trustees arising from failure(s) in performance of the Project, to the extent that the County is responsible for performance of the Project under the terms of this Agreement.
- 3.3 The County shall collaborate with the Contributing Parties to monitor and document performance of the Project as defined in Paragraph 19 of the Consent Decree. In the event that the Project results in fewer than 32.5 inundated acres at the end of the Monitoring Period, as determined in accordance with Paragraph 23 of the Consent Decree, then the County shall, consistent with Paragraph 3.4 of this Agreement, coordinate with the Contributing Parties in evaluating potential adaptive management actions at the Project site to offset the shortfall as required under Paragraph 23.a of the Consent Decree. In the event that the Project results in fewer than 30 (thirty) inundated acres at the end of the Monitoring Period and, as a result, the Contributing Parties are required to compensate the Trustees by making payment for any DSAY Credit shortfall pursuant to Paragraph 23.C of the Consent Decree, the County shall also refund to the Contributing Parties an amount equal to \$100,000.00 (One Hundred Thousand Dollars) per acre for each acre of shortfall below 30 (thirty) acres, or portion thereof, upon which the Contributing Parties' payment to the Trustees is calculated.
- 3.4 If, pursuant to Section IX of the Consent Decree, the Contributing Parties propose modifications to the Project to enhance the environmental benefit of the Project or for other reasons, and if, pursuant to Section IX of the Consent Decree and Paragraph 3.3 of this Agreement, the County agrees to implement such modifications, then the Contributing Parties will be responsible for the additional design, permitting, engineering and construction costs, if any.
- 3.5 The County and Contributing Parties agree that the County, in the performance of its obligations under this Funding Agreement, shall have the same rights and obligations that the Contributing Parties have as Defendants under the Force Majeure provisions of Section (XIX) of the Consent Decree.

3.6 The County acknowledges and accepts responsibility for the indemnification, payment, insurance and waiver provisions in Article XX of the Consent Decree, to the extent that such requirements are applicable to the Countyline Project, including the requirement to provide documentation of insurance as provided in Paragraph 52 of the Consent Decree. Further, as required under Paragraph 51.a of the Consent Decree, the County acknowledges that is not acting as an agent of any Plaintiff.

4. **Payment Obligations of Contributing Parties.**

4.1 Delivery of Executed Agreement. The Contributing Parties will sign duplicate originals of the Agreement and deliver the Agreement, with their signatures, to the County for signature. Within five business days of signature by the County, the County will by overnight express deliver one fully executed Agreement to Louis Ferreira, Stoel Rives LLP, 900 SW Fifth Avenue, Suite 2600, Portland, OR 97204, which delivery, for the purpose of delivery of the fully executed Agreement only, as provided in this section of the Agreement, shall be deemed delivery to the Contributing Parties.

4.2 Deposit in Escrow Account. Within Thirty (30) calendar days of the date that the fully executed Agreement is delivered to the Contributing Parties, Contributing Parties shall deposit a total of \$4,775,000.00 (Four Million Seven Hundred Seventy-Five Thousand Dollars) in an escrow account (the "Escrow Account") at TD Bank, N.A. Costs related to the Escrow Account, if any, shall be paid by the Contributing Parties, or out of interest earned on the account. The Escrow Account will be governed by an agreement in the form attached hereto as **Exhibit 5** (the "Escrow Agreement"), to be executed concurrently with this Agreement.

4.3 Method of Payment. Payment under this section shall be made by Electronic Funds Transfer ("EFT" or wire transfer) or certified or cashier's check to the Escrow Account, as provided in the Escrow Agreement. Payment may be by one or more EFTs or checks totaling \$4,775,000.00 (Four Million Seven Hundred Seventy-Five Thousand Dollars), as provided in this section and the Escrow Agreement.

5. **Negotiation and Entry of Consent Decree and Duty to Cooperate.** The Contributing Parties are negotiating among themselves and with the Trustees in an effort to resolve their potential NRD liability, and obtain DSAY Credit for the Project, through entry of the Consent Decree. The County and the Contributing Parties will cooperate and communicate with one another to facilitate successful and expeditious conclusion of the negotiations with the Trustees and entry of the Consent Decree. The County and the Contributing Parties agree to cooperate with each other, and if necessary to amend this Agreement to harmonize the deadlines and obligations herein for the Project with the deadlines and obligations in the Consent Decree and make other reasonable modifications to this Agreement, including but not limited to the creation of reasonable enforceable milestones for the completion of the Project. When the Consent Decree has been entered,

the Contributing Parties will promptly notify the County of such entry. The County shall not be a party to the Consent Decree.

6. **Distribution of Escrow Funds.** Upon completion of the lodging and entry of the Consent Decree, and expiration of the time within which appeal of entry of the Consent Decree may be filed or, if an appeal is filed, conclusion of any such appeal and affirmation of entry of the Consent Decree, King County may make written demand for withdrawal of funds to the Escrow Agent, with a copy of said demand to be provided to the Designated Representative of the Contributing Parties, as identified in Subparagraph 7.1 below. At such time, King County shall be entitled to all principal and interest in the Escrow Account, less the costs of the Escrow Account paid out of interest on the account, as provided in Subparagraph 4.2 above. The Escrow Agent shall disburse the funds to King County within ten (10) business days after receipt of the demand.
7. **Termination of Agreement.** In the event that the Consent Decree is not entered on or before July 1, 2015, unless this date is extended by mutual agreement expressed in writing by the Designated Representatives of King County, the Flood District, and the Contributing Parties, King County and the Contributing Parties shall jointly notify the Escrow Agent, all principal and interest in the Escrow Account, less the costs of the Escrow Account paid out of interest on the account, as provided in Subparagraph 4.2 above, shall be paid to the Contributing Parties, and the Agreement shall be terminated and of no further effect.

7.1 Designated Representatives of the Parties: Authorization. The Designated Representative of King County is the Director of the Water and Land Resources Division in the Department of Natural Resources and Parks, at the address provided for in Paragraph 8 below. The Designated Representative of the King County Flood Control Zone District is its Executive Director, at the address provided for in Paragraph 8 below. The Designated Representative of the Contributing Parties is Clark J. Davis, at the address provided for in Paragraph 8 below. The Designated Representatives of the Parties are hereby authorized to extend the deadline for entry of the Consent Decree, in anticipation of or as a result of such decree not being entered on or before July 1, 2015, for the sole purpose of not terminating this Agreement and the Escrow Account provided for herein.

8. **Notice.** Any notice provided for or concerning this Agreement shall be in writing and shall be deemed given when sent by certified or registered mail if sent to the respective representative at the address of each party as set forth below.

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To King County:

Water and Land Resources Division, Department of Natural Resources  
and Parks  
The Division Director  
201 South Jackson Street Suite 600  
Seattle, Washington 98104

To Flood District:

King County Flood Control Zone District  
The Executive Director  
W1200 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104

To the Designated Representative of the Contributing Parties:

Clark J. Davis  
Davis Law Office, PLLC  
7525 Pioneer Way Ste. 101  
Gig Harbor, WA 98335-1165

To Representatives of Contributing Parties: **[This list of Contributing Parties is subject to change by either adding new or subtracting existing contributing parties and such addition or subtraction shall not constitute a substantial change to this agreement; however, the dollar amount provided for in Paragraph 1 shall not change]**

Advance Ross and PacifiCorp Environmental Remediation Co.

Jackie Wetzsteon  
825 NE Multnomah  
Suite 906 LCT  
Portland, OR 97232

Cathy Woollums  
Senior Vice President  
Mid-American Energy Holdings  
106 East Second Street  
Davenport, IA 52801

Louis A. Ferreira, Esq.  
Stoel Rives, LLP  
900 SW Fifth Avenue  
Suite 2600  
Portland, OR 97204

Hygrade

Thomas Burgunder, Esq.  
One Oxford Centre  
Suite 4000  
Pittsburgh, PA 15219-6401

Douglas B.M. Ehlke, Esq.  
28840 11th Avenue South  
Federal Way, WA 98003

BNSF Railway Company

Matthew Wells, Esq.  
Tupper, Mack, Wells, PLLC  
2025 First Avenue  
Suite 1100  
Seattle, WA 98121

Bruce Sheppard  
BNSF Railway  
2454 Occidental Avenue South  
Building 1A  
Seattle, WA 98134

Carstens Company

Guy J. Sternal, Esq.  
Eisenhower & Carlson, PLLC  
1201 Pacific Avenue  
Suite 1200  
Tacoma, WA 98402

City Waterway Investments, Inc.

Information Needed

Conoco Phillips Company

Stephen Parkinson, Esq.  
Kristi Favard, Esq.  
Groff Murphy Trachtenberg & Everard PLLC  
300 East Pine St.  
Seattle, WA 98402

Willette A. DuBose  
HS&E Legal Specialist  
600 N. Dairy Ashford  
ML 1126  
Houston, TX 77079



F.S. Harmon  
Information Needed

Globe Manufacturing Co.  
Loren Dunn  
Courtney Seim  
Riddell Williams P.S.  
1001 Fourth Avenue  
Suite 4500  
Seattle, WA 98154

Gull Industries, Inc.  
Robie G. Russell, Esq.  
76 South Main Street  
Seattle, WA 98104-2514

J.M. Martinac Shipbuilding Corporation  
Sally E. Metteer, Esq.  
Dennis Smith, Esq.  
Wilson Smith Cochran Dickerson  
1215 Fourth Ave.  
Suite 1700  
Seattle, WA 98161

Louisiana-Pacific Corporation  
Information Needed

McFarland Cascade (Cascade Pole)  
Maureen Mitchell, Esq.  
Summit Law Group  
315 Fifth Avenue So.  
Suite 1000  
Seattle, WA 98104-2682

Menasha Corporation  
Thomas V. Bender, Esq.  
1645 Bergstrom Road  
Neenah, WI 54956

Linda Rockwood, Esq.  
Eric J. Triplett  
3200 Wells Fargo Center  
1700 Lincoln Street  
Denver, CO 80203-4532

Moorage Associates, LLC  
Guy J. Sternal, Esq.  
Eisenhower & Carlson, PLLC  
1201 Pacific Avenue  
Suite 1200  
Tacoma, WA 98402

Nestle USA, Inc.  
Information Needed

OfficeMax Incorporated  
Information Needed

OMYA  
Jeffrey T. Golenbock  
Golenbock Eiseman Assor Bell & Peskoe LLP  
437 Madison Avenue  
New York, N.Y. 10022  
Phone: (212) 907-7373  
Fax: (212) 754-0777

Puget Sound Energy  
Loren Dunn, Esq.  
Riddell Williams P.S.  
1001 Fourth Avenue  
Suite 4500  
Seattle, WA 98154

John Rork  
Manager, Environmental Services  
10885 NE 4th Street  
Bellevue, WA 98004

Rainier Plywood Co. (Rainier Richlite Co.)  
Information Needed

Johnson Postman Company  
Information Needed

Shore Terminals  
Stephen J. Tan  
Cascadia Law Group, PLLC  
1201 Third Avenue  
Suite 320  
Seattle, WA 98101

SuperValu, Inc.  
Greg Jacoby, Esq.  
McGavick Graves, P.S.  
1102 Broadway  
Suite 500  
Tacoma, WA 98402

Ron T. Mendes  
Vice President  
SuperValu, Inc.  
250 Parkcenter Blvd.  
Boise, ID 83706

The Boeing Company  
Information Needed

The DIL Trust  
Information Needed

The Jack Morris Estate, Alice J. Morris, Trustee  
Alice Morris  
c/o Marie Marek  
12452 SE 235th Street  
Kent, WA 98031

The Wattles Company  
Kurt B. Peterson, Esq.  
Mary Liton  
Cascadia Law Group PLLC  
1201 3rd Ave.  
Suite 320  
Seattle, WA 98101

Joseph A. Rehberger  
Cascadia Law Group PLLC  
606 Columbia St. NW  
Suite 212  
Olympia, WA 98501

Truck-Rail Handling, Inc.  
Robie G. Russell, Esq.  
76 South Main Street  
Seattle, WA 98104-2514  
Phone: (206) 621-2102  
Fax: (206) 621-2104  
Email: RobieGRuss@aol.com

Union Pacific Railroad

Tod A Gold, Esq.  
1601 Fifth Avenue  
Suite 2040  
Seattle, WA 98101

Gary Honeyman  
[No title/address]

Washington Floral Service, Inc.

Information Needed

WA Department of Transportation

Steve Klasinski  
Deborah Cade  
Office of the Attorney General  
PO Box 40113  
Olympia, WA 98504-0113

Woodworth & Company, Inc.

Clark J. Davis, Esq.  
[No address]

9. **Choice of Law, Jurisdiction and Venue.** This agreement shall be governed by, construed, and enforced in accordance with the laws and regulations of the United States, the State of Washington, and, where applicable, local jurisdictions. In the event that any litigation should arise concerning the construction or interpretation of any of the terms of this Agreement, the venue of such action or litigation shall be in the Superior Court of King County, Washington.
10. **No Waiver.** The failure of either the County or the Contributing Parties to insist upon the performance of any of the terms and conditions of this agreement, or the waiver of any breach of any of the terms and conditions of this agreement, shall not be construed as thereafter waiving any such terms and conditions, but the same shall continue and remain in full force and effect as if no such forbearance or waiver had occurred.
11. **Attorney Fees and Costs.** In the event of any controversy, claim, or dispute arising out of or in any way relating to this agreement or its breach, the prevailing party shall be entitled to recover its cost and reasonable attorney fees.
12. **Effect of Partial Invalidity.** The invalidity of any portion of this agreement will not and shall not be deemed to affect the validity of any other provision. In the event that any other portion of this agreement is held to be invalid, the parties agree that the remaining

provisions shall be deemed to be in full force and effect as if they had been executed by both parties subsequent to the expungement of the invalid provision.

13. **Entire Agreement.** This agreement shall constitute the entire agreement between the parties and any prior oral understanding or representation of any kind preceding the date of this agreement shall not be binding upon either party except to the extent incorporated in this agreement.
14. **Modification of Agreement.** Any modification of this agreement or additional obligation assumed by either party in connection with this agreement shall be binding only if evidenced in writing signed by each party or an authorized representative of each party.
15. **Authorization to Sign.** The parties hereto each represent and warrant that all necessary signatures and consents to enter this Agreement and to assume and perform the obligations hereunder have been duly and properly obtained.

AGREED TO THIS \_\_\_\_ day of \_\_\_\_\_, 2014.

**KING COUNTY:**

**By:**

Christie True, Director,  
King County Department of Natural Resources and Parks

\_\_\_\_\_  
Date: \_\_\_\_\_

201 South Jackson Street, Suite 700  
Seattle, Washington 98104

*Approved as to form only:*

\_\_\_\_\_  
Deputy Prosecuting Attorney

**KING COUNTY FLOOD CONTROL ZONE DISTRICT**

**By:**

Chair of the Board of Supervisors

\_\_\_\_\_  
Date: \_\_\_\_\_

W1200 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104

**REPRESENTATIVES OF CONTRIBUTING PARTIES:**

Name of Participant: \_\_\_\_\_

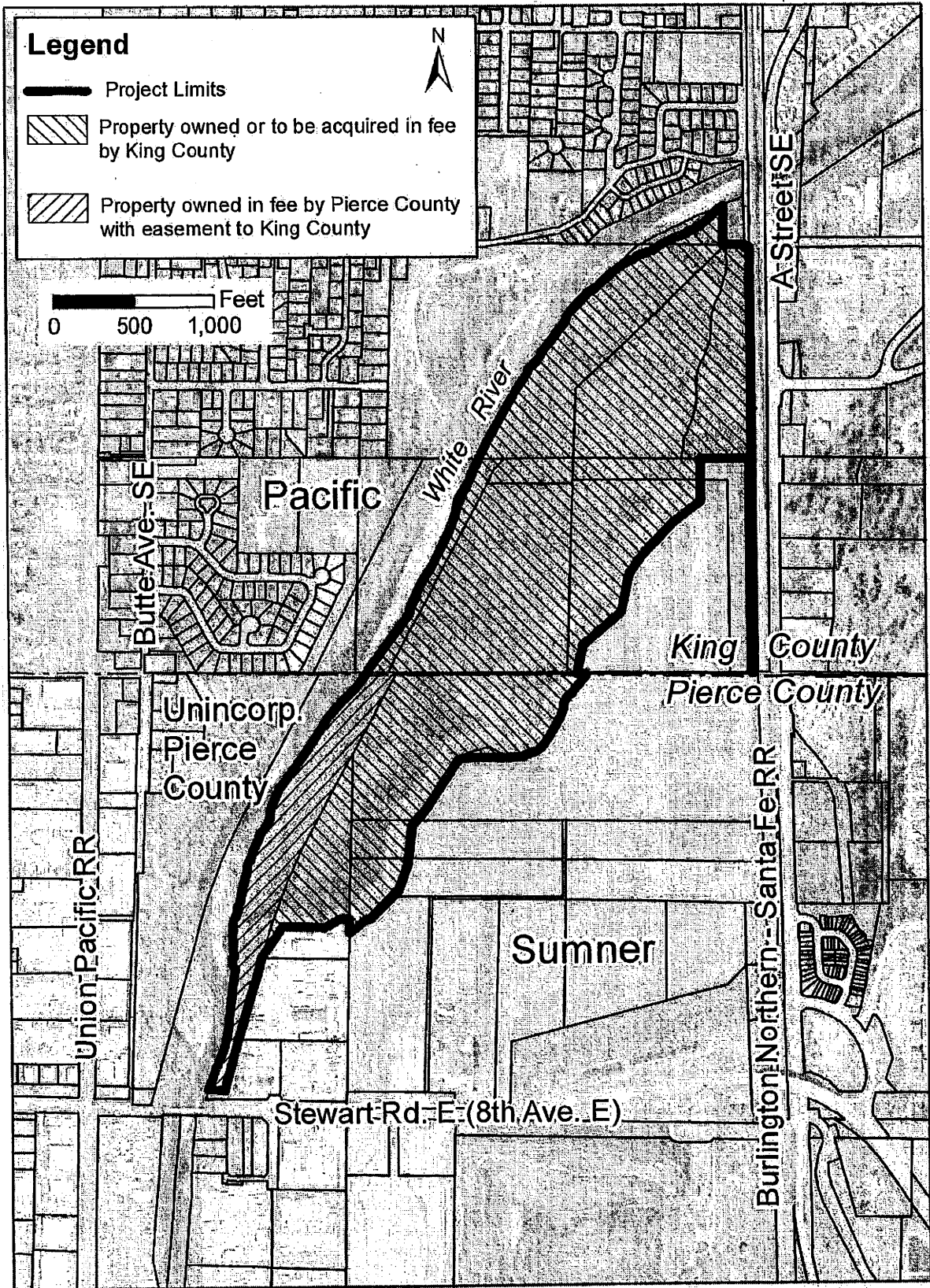
Signature: \_\_\_\_\_

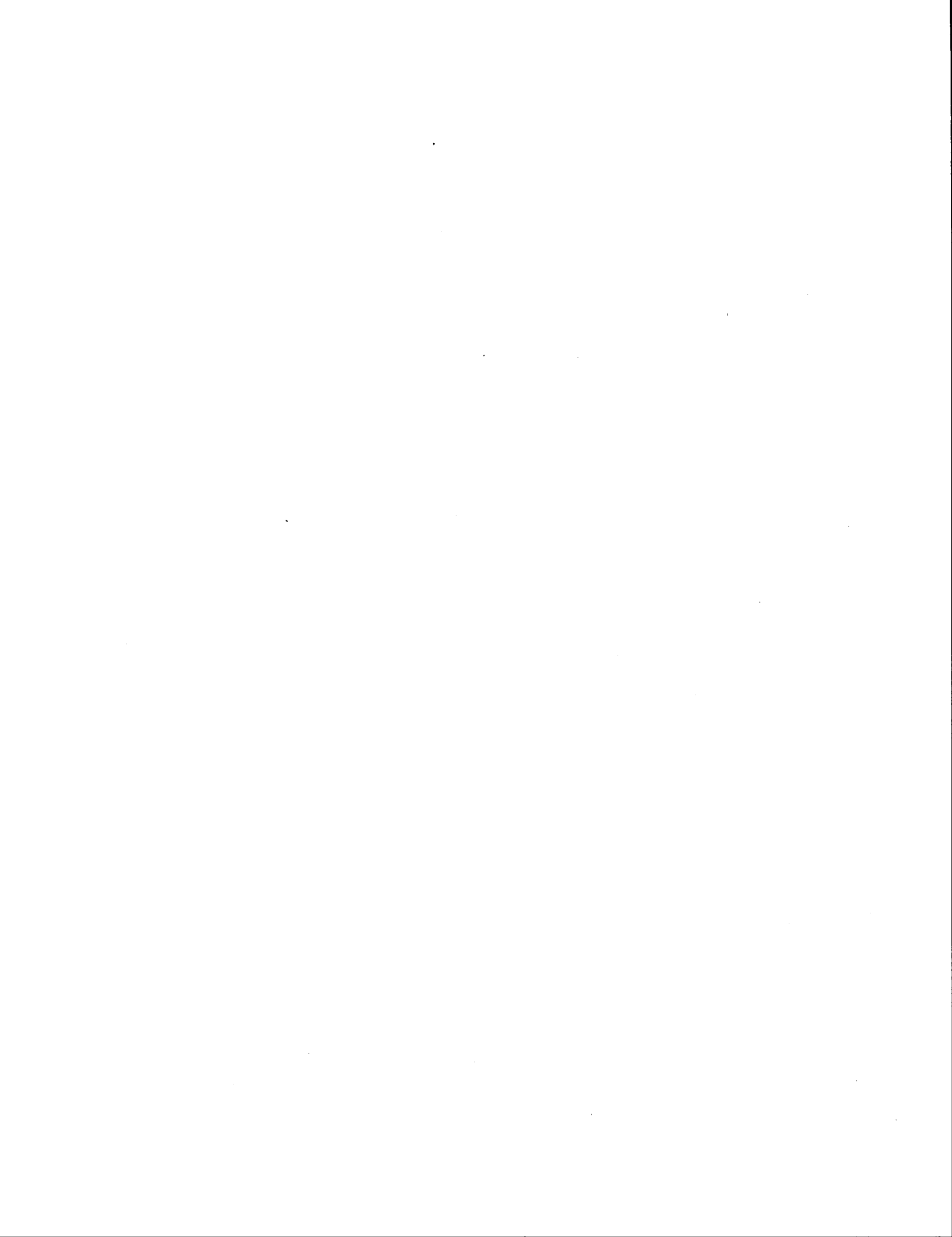
Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

# EXHIBIT 1







## Countyline Acquisition and Levee Setback Project

### 1. Project Description

The project will consist of a setback levee and biorevetment along the White River in the vicinity of the Cities of Pacific, Auburn and Sumner, WA, between river mile 5.0 and 6.3. The Countyline Acquisition and Levee Setback Project involves reconnection of a currently disconnected portion of the White River floodplain for both flood protection and habitat restoration purposes. The Countyline Project involves a combination of property acquisition, levee modification and floodplain restoration along the left (east) bank of the river between the A Street bridge in Auburn and the 8th Street bridge in Sumner. See Exhibit A for a map of the location of the Countyline Project. The project has been identified as a priority in the adopted 2006 King County Flood Hazard Management Plan. It is also listed as one of the highest priorities in the Salmon Habitat Protection and Restoration Strategy for the Puyallup and Chambers/Clover Creek Watersheds (Water Resource Inventory Area 10/12), which is a chapter of the National Marine Fisheries Service's (NMFS) Puget Sound Salmon Recovery Plan. This project directly addresses limiting factors identified in the recovery plan by restoring and providing off-channel rearing habitat for fall and spring Chinook, coho, and steelhead.

The Countyline Project includes the removal of 3,500 lineal feet (LF) of existing levee prism and revetment material (angular rock and artificial fill material) to allow the White River to meander through the floodplain complex, thus providing increased flood conveyance and storage, and rearing and refuge habitat for juvenile salmonids (See Exhibit B for Conceptual graphic of the Project). Four engineered log structures will be installed in the floodplain to promote side-channel formation and to provide cover and low-flow refuge for salmon. The riparian area (approximately 17 acres) along the upland terrace will be planted with native trees and shrubs to provide a vegetated buffer for wetland protection and to improve ecological functions within this reach of the White River. About 6,000 LF of setback levee will be constructed along the landward side of the upland buffer and will extend northeasterly to the Burlington Northern Santa Fe (BNSF) Railway embankment to provide flood containment. A log biorevetment and bank roughening structure extending 5,000 LF will be constructed along the wetland edge to prevent channel migration beyond the edge of the wetland. The biorevetment will include four bank deflector ELJs embedded into the biorevetment at the downstream edge of the large wetland (Wetland B).

Attached to this Project Description as Exhibit C are excerpts of the design drawings at the 60 percent level ("60 percent design drawings") that have been submitted in connection with required permit applications. Due to comments received from permitting agencies, changes will likely be made to the 60 percent design drawings that will be reflected in the 90 percent

design drawings and the final (100%) construction drawings. It is anticipated that any changes to the 60 percent design drawings will be design refinements that reduce adverse environmental impacts that could occur during construction. It is anticipated that these changes resulting from responses to such comments or requirements from the permitting agencies will not substantially alter the fundamental goals of the project or substantially change the quantities of the ecological and flood-protection elements and benefits of the Project described above and in Table 1. During construction, actually encountered field conditions may require slight deviations from the 100% level design drawings. Such changes will be documented in the as-built drawings and shall not compromise the fundamental goals or the ecological and flood-protection elements and benefits of the Project as described above and in Table 1.

**Table 1. Summary of the construction features**

<b>Feature Name</b>	<b>Length (ft)</b>	<b>Width (ft)</b>	<b>Material Quantity</b>	<b>Notes</b>
Setback levee	Approx. 6,000 (+/- 100)	40 to 80 (at base)	Approx. 70,000 cubic yards (CY)	Setback distance varies 30 to 600 ft from river. Levee slopes will be vegetated
Biorevetment and bank roughening structures	Approx. 5,000 (+/- 200)	30	Approx. 546 timber piles and 1,164 key logs	Vertical wood piles with interlaced horizontal logs with rootwads
Restored riparian buffer	Approx. 5,500 (+/- 250)	25 to 125	Approx. 35,000 plant	Native trees and shrubs
Engineered Log Jams (four apex structures)	60 to 80	50 to 90	Approx. 67 timber piles and 141 key logs	Three small ELJs at north end, and one large ELJ near south end of wetland
Removal of riprap levee and other artificial fill materials	Approx. 3,500 (+/- 250)	35 to 115	Approx. 31,000 CY (+/- 10,000 CY)	To be removed to the maximum extent possible but with limited tree disturbance

Construction will occur over a two-year period with the Year One construction expected to begin in May 2015, or at the latest in May of 2016, with mobilization for staging and construction management areas. Access to the project site will be obtained at a southerly point via easements to 8th Street East in Sumner and at a northeasterly point via an existing underpass crossing of the BNSF Railway connecting to A Street Southeast in Auburn. Year One will include removal of one residential house and accessory structures, construction of the setback levee and log biorevetment during the summer season, construction of engineered log jams if possible, followed with installation of native plantings in the riparian buffer during the fall season. The second year of construction will include the installation of remaining engineered log jams, and the removal of the existing levee prism, riprap rock revetment and artificial fill materials to levels down to the Ordinary High Water line. Salvage and reuse of removed materials will be emphasized in bid requirements to potential contractors. Construction is expected to be complete at the latest by the end of 2017. Record drawings will be prepared to document the as-built condition of the project.

**2. Required Permits**

**a) Federal**

Clean Water Act Section 404 Permit (Army Corps of Engineers)  
 National Historic Preservation Act Section 106 Permit (Army Corps of Engineers)  
 Endangered Species Act Section 7 Compliance (National Marine Fisheries Service and US Fish and Wildlife Service)

**b) State**

Clean Water Act Section 401 Water Quality Certification (WA Department of Ecology)  
 Hydraulic Project Approval (WA Department of Fish and Wildlife)  
 State Environmental Policy Act (SEPA) Compliance  
 Department of Natural Resources Aquatic Use Authorization

**c) Local**

**a. City of Pacific**

Grade and Fill  
 Shoreline Exemption  
 Critical Areas Review  
 Floodplain Development

**b. City of Sumner**

Fill and Grade  
 Shoreline Exemption  
 Resource, Wildlife, and Hazard Area (Critical Areas)  
 Erosion and Sediment Control  
 Floodplain Analysis

**c. Pierce County**

Fill and Grade  
 Shoreline Exemption  
 Critical Areas Review  
 Site Development

**3. Project Construction and Development Schedule**

- |  |                                 |
|--|---------------------------------|
| <b>a. SEPA completion and permit submittals</b>  | <b>July 2013 – January 2014</b> |
| <b>b. Local, State, Federal permit approvals</b> | <b>December 2014</b>            |
| <b>c. Construction Start</b>                     | <b>May 2015 or May 2016</b>     |

- d. Construction completion December 2016 or December 2017
- e. Notice of Completion 120 days after Completion of Construction

**4. Project Performance Evaluation Plan**

- a. King County will provide the Defendants with Notice of Completion that will include a post-construction report. The Notice will also include record drawings documenting the as-built conditions and demonstrating that the existing levee and revetment riprap have been removed down to the Ordinary High Water Mark level, excluding portions of the levee that are left undisturbed in order to retain existing riparian vegetation.
- b. King County reserves the right to undertake ongoing monitoring, maintenance, and repair activities on the project site in order to meet the requirements of any applicable permits, and to preserve and promote the ecological and flood protection elements and goals of the project.

**5. Post-Construction Monitoring and Adaptive Management**

- a. King County will conduct post-construction project monitoring and coordinate with the responsible parties on adaptive management as provided in Section IX of the Consent Decree.

**6. Exhibits:**

- a. Project Location Map
- b. Aerial Photo and Project Concept Graphic
- c. Project Design Drawings (60% level)





filed a complaint in this case against defendants [NAMED DEFENDANTS] (“Defendants”) pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9607; the Model Toxics Control Act (MTCA), chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; the Washington Water Pollution Control Act (WPCA), chapter 90.48 RCW; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A). This Consent Decree (the “Decree”) addresses the claims asserted in the Complaint against Defendants for Natural Resource Damages (as defined below) in the Commencement Bay Environment (as defined below).

## II. RECITALS

A. The United States Department of Commerce, acting through NOAA; 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 (collectively, “the Trustees” and, individually, a “Trustee”), under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 1321(f)(5) of CWA, Section 1006(b) of OPA, 33 U.S.C. § 2706(b), and 40 C.F.R. Part 300, subpart G, MTCA and the WPCA, 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.

B. Investigations conducted by the United States Environmental Protection Agency (“EPA”), the Trustees, and others have detected hazardous substances in the sediments, soils and groundwater of the Commencement Bay Environment, including but not limited to arsenic, antimony, cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2-ethylhexyl)-phthalate,



hexachlorobenzene, hexachlorobutadiene, polycyclic aromatic hydrocarbons (PAHs), and polychlorinated biphenyls (PCBs). In particular, the Trustees have documented the presence of over 23 hazardous substances in the marine sediments of Commencement Bay's Thea Foss and Wheeler-Osgood Waterways.

C. The Trustees began assessing natural resource damages in the Commencement Bay Environment in October 1991 by finding that hazardous substances had been released into the Commencement Bay Environment; that public trust natural resources had likely been injured by the releases; that data sufficient to pursue a natural resource damage assessment were available or could likely be obtained at a reasonable cost; and that, without further action, implemented and planned response actions would not adequately remedy the resource injuries. *See Preassessment Screen of Natural Resource Damages in the Commencement Bay Environment Due to Activities Taking Place In and About the Commencement Bay/Nearshore Tidelands (CB/NT) Superfund Site (October 29, 1991).* The Trustees notified representatives of known potentially responsible parties ("PRPs") of their intent to conduct a damage assessment. The Trustees subsequently entered into a Funding and Participation Agreement for Phase 1 of the Commencement Bay-Wide Natural Resource Damage Assessment, dated February 10, 1993, with several of the major PRPs. The Trustees published a report on the results of Phase 1 of the damage assessment process in June 1995. Those major PRPs did not participate in subsequent stages of the damage assessment, and the Trustees continued the process independently. The Trustees have now completed a series of studies during Phase 2 of the damage assessment, focusing on impacts of contaminants on marine sediments, benthic organisms, flatfish and salmonids. Results of those studies were published in a series of reports, consisting of

Commencement Bay Natural Resource Trustees, 1996, Hylebos Waterway Data and Data Analysis Report; Collier, T.K., L.L. Johnson, M.S. Myers, C.M. Stehr, M.M. Krahn, and J.E. Stein, 1998, Fish injury in the Hylebos Waterway in Commencement Bay, Washington; Mary R. Arkoosh, Ed Casillas, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical Contaminants from the Hylebos Waterway on Disease Resistance of Juvenile Salmon; Ed Casillas, Bich-Thuy L. Eberhart, Frank C. Sommers, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical Contaminants from the Hylebos Waterway on Growth of Juvenile Chinook Salmon; and Ed Casillas, Bich-Thuy L. Eberhart, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Exposure of Juvenile Chinook Salmon to Chemical Contaminants Specific to the Hylebos Waterway. While the Trustees' studies were specific to the nearby Hylebos Waterway, the Trustees assert that the study results are equally applicable to the circumstances of the Thea Foss and Wheeler-Osgood Waterways. Without admitting Plaintiffs' allegations, the Plaintiffs and Defendants (collectively, the "Parties" and, individually, a "Party") agree that no further natural resource damage assessment is required to effectuate the purposes of this Consent Decree, with respect to Defendants.

D. Plaintiffs have filed a complaint (the "Complaint") pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW; CWA, 33 U.S.C. §§ 1251 et seq.; and OPA, 33 U.S.C. §§ 2701 et seq., seeking recovery from Defendants of damages for injury to, destruction of, and loss of natural resources resulting from releases of hazardous substances into the Commencement Bay Environment, including the costs of assessing the damages.

E. Plaintiffs allege in the Complaint that Defendants each own or in the past owned and/or operated real property or facilities from which storm water, surface water runoff,

wastewater, other process discharges, and/or groundwater have flowed to the Commencement Bay Environment. Plaintiffs also allege that investigations by EPA and others have detected concentrations of hazardous substances in soils, groundwater or sediments on, in or adjacent to those properties or facilities. Some of these hazardous substances are found in the sediments of the Commencement Bay Environment.

F. Plaintiffs allege in the Complaint that hazardous substances have been released to the Commencement Bay Environment from properties or facilities owned and/or operated by each Defendant through direct discharge, surface water runoff, groundwater and seeps, and that those hazardous substances have caused injury to, destruction of and loss of natural resources in the Commencement Bay Environment under Plaintiffs' trusteeship, including fish, shellfish, invertebrates, birds, marine sediments, and resources of cultural significance. 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. Plaintiffs allege that each Defendant is either (a) the owner and/or 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 such person from which there is a release or a threatened release of a hazardous substance that causes the incurrence of response costs within the meaning of 42 U.S.C. § 9607 and RCW 70.105D.040.

H. Defendants each deny all the allegations of the Complaint.

I. Although the Trustees have initiated but not yet completed a natural resource damage assessment for the Commencement Bay Environment, the Trustees have developed and analyzed information sufficient to support a settlement that is fair, reasonable and in the public interest.

J. To facilitate resolving natural resource damage claims, relying upon the results of the damage assessment studies, remedial investigations, regulatory standards, and scientific literature, the Trustees developed an estimate of the amount of injury to natural resources that had occurred as a result of releases of hazardous substances to the Thea Foss and Wheeler-Osgood Waterways. The Trustees quantified the effects of the injuries in terms of the losses of ecological services over affected areas of the waterway and over time, discounted to the current year. The Trustees used the term *discounted ecological service acre-years* (DSAYs) to describe both the scale of the injuries, and the amount of habitat restoration they are seeking to compensate for the injuries.

K. Plaintiffs assert that hazardous-substance releases to the Thea Foss and Wheeler-Osgood Waterways have become dispersed and commingled to the extent that the effects of one PRP's releases cannot be readily distinguished from another's. Plaintiffs further assert that the circumstances of the contamination of the Thea Foss and Wheeler-Osgood Waterways make all

PRPs who contributed to the contamination jointly and severally liable for all injuries to natural resources that have resulted from the contamination. As a consequence, Plaintiffs assert the right to recover for the loss of all the calculated DSAYs and associated damage assessment costs from any Thea Foss and Wheeler-Osgood Waterways PRP. Without prejudice to their position and solely for purposes of facilitating settlement with individual PRPs, the Trustees have determined that settling with Defendants for a portion of the natural resource damages attributable to all waterway sources would result in a fair and equitable resolution of the Trustees' claims. Taking into consideration prior settlements with other PRPs who bore some liability for hazardous substance contamination of the Thea Foss and Wheeler-Osgood Waterways and releases of hazardous substances by non-settling parties, the Trustees have agreed to settle their claims against Defendants for the equivalent of 144.6 DSAYs, a portion of the Trustees' unreimbursed damage assessment costs, plus providing funding for long-term habitat oversight and stewardship activities for agreed restoration projects.

L. In settlement of this action Defendants have agreed, in lieu of and as equivalent to monetary damages, (1) to contract with King County to secure permanently the right to use real property for the purpose of natural resource restoration, to construct thereon the habitat restoration project described in Appendix A ("Countyline Project" or "Project"), attached hereto and by this reference incorporated herein, and perform any additional activities described in Appendix A; (2) to permanently protect a portion of the bed and shoreline of the Wheeler-Osgood Waterway ("Wheeler-Osgood Site," described in Appendix B) by executing and recording the Wheeler-Osgood Site deed restriction, attached hereto as Appendix C, intended to preserve the site in perpetuity for use as a habitat restoration site; (3) to pay \$50,000.00 to

support project oversight by the Trustees; (4) to pay [\$150,000.00] toward the Trustees' long-term restoration project oversight and stewardship activities and (5) to reimburse [\$725,580.00] in natural resource damage assessment costs incurred by the Trustees.

M. The Trustees have determined that the timely actions and expenditures to be undertaken by Defendants under this Consent Decree are appropriate and necessary to protect and restore the natural resources allegedly injured as a result of alleged actions or omissions of Defendants that are addressed herein, that such timely actions and expenditures will produce DSA Ys sufficient to offset Defendants' allocated liability, and are adequate to redress Defendants' responsibility for the Natural Resource Damages that are the subject of this proceeding. In return the Trustees have agreed to covenant not to sue Defendants for Natural Resource Damages as provided below in Paragraph 54.

N. Defendants do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the Complaint and the matters alleged in this Consent Decree.

O. Plaintiffs and Defendants agree, and this Court by entering this Decree finds, that this Decree has been negotiated by the Parties in good faith; that settlement of this matter will avoid prolonged and complicated litigation between the Parties; and that this Decree is fair, reasonable, and in the public interest.

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

### III. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1367, and 42 U.S.C. §§ 9607 and 9613(b) and 33 U.S.C. § 2717(b). The Court has personal jurisdiction over the Parties. Solely for the purposes of this Decree and

the underlying Complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties may not challenge the terms of this Decree or this Court's jurisdiction to enter and enforce this Decree.

#### IV. PARTIES BOUND

2. This Decree is binding upon the United States, the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, each Defendant and their heirs, successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer of assets or real or personal property, will in no way alter the status or responsibilities of the Parties under this Decree.

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

#### V. DEFINITIONS

4. Unless otherwise expressly provided, terms used in this Decree that are defined in CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in CERCLA or in such regulations. Whenever the terms listed below are used in this Decree or in any attached appendix, the following definitions will apply:

- a. "CERCLA" means the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Commencement Bay Environment" means the waters of Commencement Bay, State of Washington -- including the shoreline, intertidal areas, tributaries, drainage areas, estuaries and bottom sediments -- lying south of a line drawn from Point Defiance to Dash Point. These waters include the Thea Foss Waterway, Wheeler-Osgood Waterway, Middle Waterway, St. Paul Waterway, Puyallup River from the mouth south to the present City limits, Milwaukee Waterway, Sitcum Waterway, Blair Waterway, and Hylebos Waterway. This area includes but is not limited to the Commencement Bay Nearshore/Tideflats Superfund Site, as identified or amended by the EPA, including the B&L Landfill, and areas affected by releases of hazardous substances within the Commencement Bay Nearshore/Tideflats Superfund Site.
- c. "Commencement Bay Restoration Account" means the Commencement Bay Natural Resource Restoration Account authorized by the Order Directing the Deposit of Natural Resource Damages into the Registry of the Court in *United States v. Port of Tacoma*, No. C93-5462B (W.D. Wash. Oct. 8, 1993) (attached as Appendix D).
- d. "Consent Decree" or "Decree" means this Consent Decree and all attached appendices. In the event of a conflict between this Consent Decree and any Appendix, the Consent Decree will control.
- e. "Countyline Project" or "Project" means the Countyline Project described in Appendix A.
- f. "Day" means a calendar day. In computing any period of time under this Consent Decree, where the last day falls on a Saturday, Sunday, or federal holiday, the period of



time will run until the close of business of the next working day.

g. “DSAYs” means discounted ecological service acre-years, the metric established by the Trustees to determine the scale of Natural Resource Damages liability associated with the Thea Foss and Wheeler-Osgood Waterways and the natural resource restoration efforts needed to compensate for injury to, destruction or loss of natural resources giving rise to liability.

h. “Defendant” means each one of, and “Defendants” means all of, [NAMED DEFENDANTS].

i. “Entry of the Consent Decree” means the date that the Court signs and enters the Decree into the record of the above-captioned matter after the close of the public comment period.

j. “King County” means the King County Department of Natural Resources and Parks, as sponsor and implementer of the Countyline Project. It does not mean or include the King County Metro Transit Division, a named Defendant herein.

k. “MTCA” means the Model Toxics Control Act, Chapter 70.105D RCW.

l. “Natural Resources” means that definition as provided in 42 U.S.C. § 9601(16).

m. “Natural Resource Damages” means damages, including costs of damage assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; Chapter 90.48 RCW; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A), for injury to, destruction of, or loss of natural resources resulting from releases of hazardous

substances or discharges of oil to the Commencement Bay Environment at or from sites along, adjacent to or draining to the Thea Foss and Wheeler Osgood Waterways.

n. “Parties” mean the United States, the State of Washington, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and Defendants.

o. “Plaintiffs” means the United States, the State, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe.

p. “Project Site” means the approximately 115 acre site composed of all or a portion of King and Pierce County tax parcels in Pacific and Sumner, Washington, and unincorporated Pierce County, Washington, as more particularly indicated in Appendix A, in which King County has or is in the process of obtaining real property interests sufficient to construct, repair, and maintain the Countyline Project in perpetuity, in a manner consistent with the terms of this Consent Decree.

q. “Trustees” mean the United States Department of Commerce, acting through NOAA; the Department of the Interior; the Washington State Department of Ecology, on behalf of the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe.

r. “Wheeler-Osgood Site” means the approximately four-acre site composed of a portion of Pierce County tax parcel 0320041028, in Tacoma, Washington, as indicated in Appendix B, that is owned by Defendant BNSF Railway Company that will become subject to a Deed Restriction (Appendix C) intended to preserve the site in perpetuity for use as a habitat restoration site.

## 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 of liability by any Defendant for any claims or allegations made in the Complaint or in this Consent Decree.
7. Except where otherwise expressly provided, each Defendant shall be jointly and severally responsible for performing the obligations undertaken by Defendants under this Consent Decree, including those obligations specifically undertaken by King County. Plaintiffs may take such actions as provided below to enforce the terms of this Consent Decree against any one or more of Defendants as Plaintiffs may choose.
8. This Consent Decree shall not be used as evidence against any Party in any action or proceeding other than an action or proceeding to enforce the terms of this Consent Decree.
9. All activities undertaken by Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable laws and permits.
10. Defendants shall ensure that all work performed under this Consent Decree shall be conducted pursuant to the design and schedule approved by the Trustees in Appendix A attached hereto and shall be subject to review by the Trustees. If the Trustees determine that Defendants are not complying with the design and schedule set forth in Appendix A, the Trustees shall provide prompt written notice to Defendants specifying the basis for their determination of noncompliance. Defendants may correct the noncompliance or invoke the dispute resolution procedures set forth in Section XVII below. Subject to the right of Defendants to invoke the dispute resolution provisions, the Trustees may require Defendants to take actions, to alter, suspend or cease ongoing activities, and to alter, postpone or refrain from taking proposed

actions, as the Trustees reasonably deem necessary to ensure compliance with the terms of this Consent Decree and any plans or proposals adopted hereunder.

11. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any law.

12. Where any portion of the activities undertaken pursuant to this Consent Decree requires a federal, state or local permit or approval, Defendants shall cause timely and complete applications to be submitted and take all other actions necessary to obtain all such permits or approvals. Defendants shall use best efforts to cause any necessary permits to be obtained, and any delays in permit issuance that may occur despite such best efforts shall not constitute non-compliance with the timelines set out in Appendix A.

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

## VII. PROJECT SITE

14. King County has obtained or is in the process of obtaining all real property interests necessary to construct, operate, maintain and repair the Project Site forever for open space, flood protection and control, salmon recovery and conservation purposes. Each parcel or portion of a parcel constituting the Project Site as shown in Appendix E-1 hereto shall be subject

to deed restrictions, the form of which are attached as Appendices E-2 and E-3 hereto, and which shall be recorded prior to the initiation of construction of the Project, and which shall bind such parcels in perpetuity to the restrictions and requirements of this Consent Decree.

#### VIII. PROJECT DEVELOPMENT

15. Defendants shall provide the funds and services and ensure that all necessary steps are taken to construct the Countyline Project and to perform any additional activities in accordance with the details, specifications and project development schedule set out in Appendix A.

16. Defendants shall avoid taking any action on the Project Site property or adjacent property owned or controlled by Defendants that is inconsistent with this Consent Decree and that would interfere with the Countyline Project such that it would substantially decrease the likelihood of success of the Project. Provided, however, that Defendants (including their agents, contractors, successors and assigns) are authorized to use, develop, and operate on adjacent property as is consistent with existing or subsequently issued permits and is otherwise in compliance with applicable law, and such use, development and operations shall not be considered inconsistent with this Consent Decree or an interference with, or diminishment of, the Countyline Project. Provided, however, that no Defendant shall take or permit to be taken any action on adjacent property that constitutes a trespass on the Project Site. Defendants shall notify the Trustees in writing at least 30 days prior to entering into any contracts for or applying for any permits for the taking of any actions on the Countyline Project Site other than those identified in Appendix A. Such notice shall include a narrative description of the proposed actions plus a site diagram indicating the location of the proposed actions.

17. Within 120 days after completion of construction of the Countyline Project, Defendants shall submit a written Notice of Completion to the Trustees. The Notice of Completion shall include copies of all permits issued for the Countyline Project plus a set of as-built project drawings. The Trustees shall review the course and results of the development of the Countyline Project to determine whether the Project has been completed in accordance with Appendix A. Within 60 days after receiving the Notice of Completion, the Trustees shall submit to Defendants either (a) a written notice identifying specific deficiencies the Trustees determine must be satisfied for the Countyline Project to be completed in accordance with Appendix A (Notice of Deficiencies); or (b) 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, Defendants shall correct the identified deficiencies and complete the Countyline Project in accordance with Appendix A, and submit to the Trustees an amended Notice of Completion for review and response in accordance with this Paragraph. Any delay in completing Countyline Project construction as a result of the operation of this Paragraph shall not in and of itself constitute grounds for relief from the requirement to pay stipulated penalties under Section XVIII for compliance delays.

18. Within 180 days following receipt of the Trustees' Notice of Approval of Completion for the Countyline Project, Defendants shall submit to the Trustees a Project Completion Accounting. The Project Completion Accounting shall itemize the costs incurred by King County in developing the Countyline Project and shall be substantially in the form of Appendix F attached hereto.

## IX. POST-CONSTRUCTION MONITORING AND ADAPTIVE MANAGEMENT

19. To confirm that the Countyline Project produces the number of DSA Ys needed to offset the Defendants' allocated liability, Defendants shall monitor the performance of the Project over a period not to exceed ten years ("Monitoring Period") to demonstrate that, on average, the White River inundates at least 32.5 acres of the Project Site ("Inundation Goal"). Such monitoring shall be performed in accordance with the following particulars:

a. Defendants shall monitor site inundation by means of an aerial photograph which shall be taken between February 1 and March 31 for each year of required monitoring ("Required Monitoring Event").

b. Except as provided in Paragraph 21, Defendants shall acquire the required aerial photograph in the first, third, fifth, seventh and tenth years following completion of construction. Defendants may elect to acquire aerial photographs between February 1 and March 31 in other years during the Monitoring Period.

c. Defendants shall acquire the aerial photographs at a time of day, with sun angle, image angle, weather and lighting conditions, elevation, and image resolution sufficient to permit unambiguous determination of the extent of site inundation.

d. Defendants shall provide NOAA an electronic, ortho-rectified copy of the photograph by May 31 in any year in which Defendants acquire aerial photographs under Subparagraph 19.b.

20. The Trustees shall use the supplied photographs to calculate the acres of inundation of the Project Site, and shall recalculate the average inundation acreage after each Required Monitoring Event. The Trustees shall also perform such calculations for any other

years in which Defendants provide aerial photographs that satisfy the conditions of Subparagraphs 19.a- d. The Trustees shall notify Defendants of the results of their calculations within 45 days after each calculation or recalculation.

21. If the Trustees' calculation of the acres of inundation exceeds an average of 48.8 acres over the course of any three consecutive monitoring events, including Required Monitoring Events and any monitoring conducted in other years as provided in Subparagraph 19.b, the requirements of this Section shall be deemed fulfilled and Defendants shall have no further monitoring or adaptive management requirements for the Project.

22. If, following the third Required Monitoring Event, the Trustees' calculation of average inundation of the Project Site demonstrates that the inundation does not exceed 29.5 acres, the Trustees and Defendants shall, within 60 days after the Trustees' notice to Defendants, meet to discuss the conditions preventing the Project Site from achieving the Inundation Goal and what measures Defendants will take to increase the likelihood of achieving the Inundation Goal by the end of the Monitoring Period.

23. If, following the last Required Monitoring Event, the Trustees' calculations demonstrate that the ten-year average inundation of the Project Site falls short of the Inundation Goal, the Trustees shall so notify the Defendants by issuing a Notice of Deficiency. The Notice of Deficiency shall identify the number of acres of average inundation and corresponding number of DSAYs that the Site failed to produce.

a. Within 60 days following the date of the Trustees' Notice of Deficiency, Defendants shall submit to the Trustees a proposed plan and schedule for taking actions, on the Project Site or elsewhere in a location approved by the Trustees adjacent to or downstream of the



Project Site, to produce a sufficient number of DSAYs to offset the shortfall identified in the Notice of Deficiency.

b. Within 45 days following receipt of the Defendants' proposed plan and schedule, the Trustees shall respond with specific comments or a statement indicating the Trustees' acceptance of the proposed plan and schedule.

c. Within 45 days following the date of the Trustees' comments, Defendants shall either revise and implement the proposed plan and schedule consistent with the Trustees' comments and thereafter commence work in accordance with the revised plan and schedule, or shall compensate the Trustees for the identified DSAY shortfall by paying the sum of \$66,000 times the total DSAY shortfall, adjusted by the increase in the Consumer Price Index over the Monitoring Period. Payments in accordance with this Subparagraph will be made to the Department of the Interior's Natural Resource Damage Assessment and Restoration Revolving Fund, per instructions provided by the Trustees.

#### X. ACCESS TO INFORMATION AND PROJECT SITE

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

25. From and after the Effective Date, Defendants shall cause the Trustees and their contractors to have access at all reasonable times to the Project Site and to any property under the control of any Defendant 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 to the property owner(s) and King County 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 Countyline 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 Defendants or their contractors hereafter retained to perform 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 maintenance actions as provided in Subparagraph 25.f;
- e. Using a camera, sound recording device or other type equipment to record the work done under this Consent Decree or injuries to natural resources;
- f. Undertaking any maintenance action as the Trustees determine appropriate. Such maintenance actions shall only be taken with the approval of the property owner(s) and King County, which approval may be withheld only upon a showing that the proposed action would be inconsistent with the purposes of the Project as described in Appendix A (including the Project's flood control purposes), would be inconsistent with other provisions of this Consent Decree or other applicable law, or would impose costs or additional liability upon Defendants or King County. For the purposes of this Subparagraph 25.f, "maintenance" does not include any repair, modification, or alteration that changes the ecological function, character,

scope or size of the Project as described in Appendix A.

26. Defendants 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 with ongoing operations.

#### XI. IDENTIFICATION OF CONTRACTORS

27. Trustees and Defendants agree that the Countyline Project as described in Appendix A is to be constructed, operated, repaired and maintained by King County. The Defendants shall cause the Trustees to be notified in writing of all contractors selected by King County, in accordance with state and local procurement laws, to implement the Project, within 30 days of such selection by King County. Defendants shall ensure that contracts for implementation of the Project under the terms of this Consent Decree shall be consistent with Appendix A.

#### XII. REIMBURSEMENT OF RESTORATION OVERSIGHT COSTS

28. Defendants shall reimburse Trustee costs incurred in the oversight of the development and maintenance of the Countyline Project and in monitoring Project performance in the total amount of \$50,000. Sums paid under this Paragraph shall be deposited in the Commencement Bay Restoration Account for use as the Trustees shall determine in accordance with the terms of this Consent Decree and other applicable law. Payment shall be made as provided below in Paragraph 35.

#### XIII. PRESERVATION OF WHEELER-OSGOOD SITE

29. BNSF Railway Co. ("BNSF") owns the Wheeler-Osgood Site, as described in Appendix B.

30. Within 30 days of the Effective Date, BNSF shall record in the applicable real property records for the real property comprising the Wheeler-Osgood Site a deed restriction intended to make the site available in perpetuity for the purposes of habitat preservation and restoration and inform 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 (attached hereto as Appendix C).

31. As provided in Appendix C, BNSF shall not sell, grant, lease or otherwise transfer to any party an interest in the real property comprising the Wheeler-Osgood Site other than as specifically contemplated in this Consent Decree without the prior written consent of the Trustees, and the United States Department of Justice (“DOJ”).

32. Defendants shall avoid taking any action on the Wheeler-Osgood Site or on adjacent property owned or controlled by any Defendant that would substantially diminish the value of the Wheeler-Osgood Site as natural resource habitat. Provided, however, Defendants (including their agents, contractors, successors and assigns) are authorized to use, develop and operate on adjacent property as is consistent with existing or subsequently issued permits and is otherwise in compliance with applicable law, and such use and operations shall not be considered an interference with, or diminishment of, the deed restrictions for the Wheeler-Osgood Site set forth in Appendix C. Provided, however, that no Defendant shall take or permit to be taken any action on adjacent property that constitutes a trespass on the Wheeler Osgood Site.

33. The Trustees may at any time implement, or authorize any third party to implement, such further restoration actions on the Wheeler-Osgood Site as they determine

appropriate. Such further restoration actions shall only be taken with the approval of BNSF Railway Co. and under a mutually acceptable access agreement between the Trustees and BNSF. BNSF's approval may be withheld only upon a showing that the proposed activity would be inconsistent with the purposes of preserving and enhancing the ecological value of the site, would be inconsistent with other provisions of this Consent Decree or other applicable law, would unreasonably interfere with BNSF Railway Co.'s use of adjacent property, or would impose costs upon BNSF Railway Co.

#### XIV. PERMANENT RESTORATION PROJECT STEWARDSHIP

34. Defendants' agreement to develop the Countyline Project and to preserve the existing habitat values of the Wheeler-Osgood Site is intended to generate ecological services sufficient to offset Defendants' allocated liability for natural resource damages calculated by the Trustees in terms of DSAYs. The Trustees' computation of DSAYs assumes that restoration projects constructed as designed will produce ecological services in perpetuity. To ensure that the public receives the full benefit of the agreed restoration actions, Defendants also agree to contribute financially to the costs of long-term monitoring, maintenance and adaptive management of the Countyline Project after fulfilling all permit requirements as required by Section VIII. Defendants also agree to contribute financially to the costs of long-term monitoring, maintenance and adaptive management of the Wheeler-Osgood Site beginning on the Effective Date of this Consent Decree. Defendants' financial contributions to the costs of long-term monitoring, maintenance and adaptive management for the Countyline Project and Wheeler Osgood Site described in this Paragraph will be fully satisfied upon Defendants' payment of the sums provided in Section XV below, and Defendants will have no other

continuing funding obligations under this Decree.

XV. PAYMENT OF COSTS OF PROJECT OVERSIGHT,

LONG TERM STEWARDSHIP AND

NATURAL RESOURCE DAMAGE ASSESSMENT

35. Within 30 days of the Effective Date, Defendants will pay to the Trustees [\$200,000.00], consisting of the \$50,000.00 for restoration project oversight costs as stipulated above in Paragraph 28, plus the [\$150,000.00] to contribute to the Trustees' long-term oversight and stewardship activities as stipulated above in Paragraph 34. This payment will be made by electronic funds transfer per directions provided by the Clerk of the Court for deposit into the Commencement Bay Natural Resource Restoration Account.

36. Within 30 days of the Effective Date, Defendants will pay to the Trustees additional sums totaling [\$725,580.00] in natural resource damage assessment costs. These sums shall be paid in the following amounts and particulars:

Trustee: National Oceanic and Atmospheric Administration  
Amount: \$\*\*\*\*\*

Trustee: U.S. Department of the Interior  
Amount: \$\*\*\*\*\*

Payments to NOAA and the U.S. Department of the Interior shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures. Payment shall be made in accordance with instructions provided to Defendants by the Financial Litigation Unit of the U.S. Attorney's Office of the Western District of Washington. Any payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall be credited on the next business day. Defendants shall provide at least five

days notice to the Financial Litigation Unit before making the transfer.

Payments to the other Trustees shall be made by certified checks, or as otherwise directed by the recipient, with the notation "Thea Foss NRDA Mediation Group - Commencement Bay Assessment Costs," in the amounts indicated and made payable and addressed as follows:

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

37. At the time of each payment Defendants will send notice that payment has been made to the Trustees and DOJ in accordance with Section XXV (Notices and Submissions).

Such notice will reference Commencement Bay NRDA, DOJ case number 90-11-2-1049, and the civil action number set forth in the caption of this Consent Decree.

#### XVI. FAILURE TO MAKE TIMELY PAYMENTS

38. If Defendants fail to make any payment under Paragraphs 35-36 by the required due date, interest shall be assessed at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Interest will continue to accrue on the unpaid balance through the date of payment.

#### XVII. DISPUTE RESOLUTION

39. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree.

40. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Trustees and Defendants. The period for informal negotiations shall not exceed twenty-one (21) days from the time the dispute arises, unless the parties to the dispute agree otherwise in writing. The dispute shall be considered to have arisen when the Trustees send Defendants a written notice specifying the nature of the dispute and requested relief (“Notice of Dispute”) or Defendants send the Trustees a written Notice of Dispute.



41. a. If the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Trustees shall be considered binding unless, within twenty-one (21) days after the conclusion of the informal negotiation period, Defendants invoke the formal dispute resolution procedures of this Section by serving on the Trustees a written Statement of Position on the matter in dispute, including, but not necessarily limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Defendants.

b. Within twenty-one (21) days after receipt of Defendants' Statement of Position, the Trustees shall serve on Defendants their written Statement of Position, including, but not necessarily limited to, any factual data, analysis or opinion supporting that position and all supporting documentation relied upon by the Trustees.

c. An administrative record of the dispute shall be maintained by the Trustees and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section.

d. The Defendants and the Trustees each shall identify a Formal Dispute Resolution Representative, who shall meet to discuss the matter in dispute at the earliest available opportunity and who will meet and work in good faith to resolve the matter in dispute. If the Parties fail to resolve the dispute within twenty-one (21) days after the initial meeting of the Formal Dispute Resolution Representatives, then the position advanced by the Trustees in their Statement of Position shall be considered binding upon Defendants, subject to any agreements the Formal Dispute Resolution Representatives may have reached on one or more issues. In such event, the Trustees shall within five (5) days of the conclusion of the formal

dispute resolution process notify Defendants in writing that the formal dispute resolution process has concluded. Defendants may seek judicial review of the Trustees' Statement of Position (as modified by any agreements the Formal Dispute Resolution Representatives may have reached) pursuant to the following Subparagraph.

e. Any matter in dispute shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Defendants with the Court and served on all Parties within twenty-one (21) days of receipt of the Trustees' letter notifying Defendant of the conclusion of the formal dispute resolution process. The motion shall include a description of the matter in dispute (including both Statements of Position), the efforts of the parties to resolve the dispute, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Parties shall jointly move the Court to establish a schedule under which the Plaintiffs file a response to Defendants' motion within twenty-one (21) days of receipt of the motion, and Defendants file a reply brief within five (5) business days of receipt of the response. If the Court does not grant the motion for such a schedule, then the Parties shall file the response and reply in accordance with the schedule set forth in the Local Rules for the Western District of Washington.

f. The Court may rule based on the administrative record, with or without oral argument, and shall review Trustees' Statement of Position or its resolution of the dispute under the standards of the Administrative Procedures Act.

g. The foregoing notwithstanding, the Parties acknowledge that disputes may arise that require resolution on an expedited basis. In such cases, the Parties shall agree on an

expedited schedule or, absent prompt agreement, either Defendants or the Trustees may petition the Court for the imposition of an expedited schedule.

42. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of the Defendants under this Consent Decree, not directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue, but payment otherwise required under Section XVIII shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVIII (Stipulated Penalties).

#### XVIII. STIPULATED PENALTIES

43. The Parties stipulate that delays in carrying out the activities required herein may diminish the compensatory value attributable to those activities. Consequently, in the event that Defendants exceed the deadline provided for one of the activities described below (subject to any modifications agreed to under Section XXX) and such delay is not excused through operation of the dispute resolution provisions (Section XVII) and/or the force majeure provisions (Section XIX), Defendants shall, as a stipulated penalty, increase the financial contributions it makes under this Consent Decree to fund habitat restoration actions, over and above any payments required elsewhere under this Consent Decree, as follows:

a. For each week Defendants fail to comply with a deadline under Paragraph 31 or 32 for making any payment; in the Countyline Project Development Schedule

included in Appendix A; under Paragraph 17 for submitting a Notice of Completion; under Paragraph 18 for submitting a Project Completion Accounting; under Paragraph 19 for providing a performance monitoring photograph; under Subparagraph 23.a for submitting a proposed plan and schedule; under Subparagraph 23.c for implementing the plan or making the required payment; or under Paragraph 52 for providing copies of certificates of insurance and insurance policies, Defendants shall pay a stipulated penalty in the amount of \$1,000. Where the delay extends beyond the second week, the stipulated penalty shall apply to each additional day of delay for each such missed deadline. For purposes of this Subparagraph, a week shall equal a continuous period of seven days.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by the Trustees. All payments to the Trustees under this Paragraph will be made by a certified check made payable to the Clerk of the Court. This check will be deposited in the Commencement Bay Restoration Account.

c. At the time of each penalty payment under this Paragraph, Defendants will send notice that payment has been made to the Trustees and DOJ in accordance with Section XXV (Notices and Submissions). This notice will reference Commencement Bay NRDA, DOJ Case Number 90-11-2-1049, and the civil action number set forth in the caption of this Consent Decree.

d. Penalties will accrue as provided in this Paragraph regardless of whether the Trustees have notified Defendants of the violation or made a demand for payment, but the penalties need only be paid upon demand. Penalties for late payments will begin to accrue on the day after payment is due. All other penalties will begin to accrue on the day after the Trustees'

notice of noncompliance pursuant to Paragraph 10 and will continue to accrue through the date of payment. Nothing in this Decree prevents the simultaneous accrual of separate penalties for separate violations of this Decree.

e. Defendants may dispute the Trustees' right to the penalties identified under Subparagraph a. above by invoking the dispute resolution procedures of Section XVII.

44. If Defendants fail to pay stipulated penalties when due, the Trustees may institute proceedings to collect the penalties, as well as interest. Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Subparagraph 43.b.

45. If Plaintiffs bring a motion or a separate action in court to enforce this Decree and prevail, Defendants will reimburse Plaintiffs for all costs of such action, including but not limited to costs of attorney time.

46. Payments made under this Section are in addition to any other remedies or sanctions available to Plaintiffs by virtue of Defendants' failure to comply with the requirements of this Decree.

47. Notwithstanding any other provision of this Section, Plaintiffs may, in their unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree. Payment of stipulated penalties does not excuse Defendants from payment as required by Section XV or from performance of any other requirement of this Consent Decree.

48. The Trustees may use sums paid as stipulated penalties under Paragraph 43 to pay unreimbursed damage assessment costs and/or to fund or contribute to additional actions to

restore Commencement Bay natural resources.

#### XIX. FORCE MAJEURE

49. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendants that delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and use 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. The requirement that Defendants exercise "best efforts to fulfill the obligation" also includes, where necessary, the filing of legal actions to compel contract performance in accordance with the design and schedule approved by the Trustees herein.

50. 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, Defendants shall notify the Trustees within 14 days of when Defendants first knew that the event might cause a delay. Within 30 days thereafter, Defendants 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 Defendants intend to assert such a claim). Defendants shall include with any notice all available documentation supporting their

claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements will preclude Defendants 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 Defendants in writing of their decision.

c. If Defendants elect to invoke the dispute resolution procedures set forth in Section XVII, above, regarding a claimed force majeure event it shall do so no later than 30 days after receipt of the Trustees' notice of disagreement. In any such proceeding Defendants 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 Defendants exercised best efforts to fulfill the obligation in question, and that Defendants complied with the requirements of this Paragraph. If Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Defendants of the affected obligation of this Consent Decree.

## XX. INDEMNIFICATION; INSURANCE

51. a. The Plaintiffs do not assume any liability by entering into this agreement. Defendants shall, or shall cause King County to, indemnify, save and hold harmless each of the

Plaintiffs and/or their officials, agents, employees, contractors, subcontractors, or representatives from any and all damage claims or causes of action arising from or on account of the acts or omissions of Defendants or King County 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, Defendants agree to, or agree to cause King County 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 Defendants or King County 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 Defendants in carrying out the requirements of this Consent Decree. Neither Defendants nor King County shall be considered an agent of any Plaintiff, and Defendants shall require King County to affirmatively acknowledge that it is not acting as an agent of any Plaintiff.

b. Defendants shall waive, and shall cause King County to waive any claims against the Plaintiffs for damages or reimbursement or for set-off against any payments made or to be made to the Plaintiffs, arising from or on account of any contract, agreement or arrangement between Defendants or King County and any other person in carrying out the requirements of this Consent Decree, including, but not limited to, claims on account of construction delays. In addition, Defendants shall, and shall cause King County to, indemnify and hold harmless the Plaintiffs with respect to any claims for damages or reimbursement arising



from or on account of any contract, agreement, or arrangement between Defendants or King County and any person in carrying out the requirements of this Consent Decree including, but not limited to, claims on account of construction delays.

52. No later than 15 days before commencing any work involved in implementing this Consent Decree, Defendants shall, or shall cause King County to, secure and maintain comprehensive general liability insurance and automobile liability insurance with limits of \$1,000,000 (one million dollars), combined single limit or provide evidence of their ability to self-insure to such limits. In addition, for the duration of any work conducted in carrying out this Consent Decree Defendants shall ensure, or shall cause King County to ensure that all persons or entities performing any work involved in implementing this Consent Decree comply with all applicable laws and regulations regarding the provision of worker's compensation insurance. No later than 15 days before commencing any work involved in implementing this Consent Decree, Defendants shall, or shall cause King County to, provide to the Trustees evidence of King County's, and any persons' or entities' performing such work under contract or subcontract with King County, compliance with applicable laws and regulations regarding the provision of worker's compensation insurance. Defendants shall, or cause King County to, resubmit such evidence each year on the anniversary of the Effective Date of this Consent Decree. If Defendants demonstrate 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, Defendants need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor.

53. The Trustees agree to require that any contractor who performs work for them in the Countyline Project area or the Wheeler Osgood Site shall agree to indemnify and hold harmless King County or BNSF, respectively, 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.

#### XXI. COVENANT NOT TO SUE BY PLAINTIFFS

54. Except as specifically provided in Section XXII (Reservations of Rights) below, Plaintiffs covenant not to sue or to take administrative action against Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; or Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(a), to recover Natural Resource Damages. This covenant not to sue will take effect upon the Effective Date of this Consent Decree and continue in effect conditioned upon the satisfactory performance by Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to each Defendant and its heirs, successors and assigns, and does not extend to any other person.

#### XXII. RESERVATIONS OF RIGHTS

55. Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against Defendants with respect to all matters not expressly included within the Covenant Not to

Sue by Plaintiffs in Paragraph 54. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve all rights against Defendants with respect to:

a. liability for costs of response incurred or to be incurred by Plaintiffs under any federal or State statute, provided, however, that nothing in this Subparagraph 55.a shall be deemed to supersede or conflict with the provisions of the consent decree[s] entered in United States v. Advance Ross Sub Company et al., W.D. Wash. Case number C03-5117RJB (March 3, 2003) and United States v. Atlantic Richfield Company et al., W.D. Wash. Case number C03-5117RJB (March 3, 2003);

b. liability for damages to natural resources (including assessment costs) as defined 42 U.S.C. §§ 9601(6 & 16) that are not expressly included within the Covenant Not to Sue by Plaintiffs in Paragraph 50;

c. liability for damages to natural resources (including assessment costs) as defined 42 U.S.C. §§ 9601(6 & 16) within the Commencement Bay Environment resulting from new releases of hazardous substances from any Defendant's operations after the Effective Date of this Consent Decree, or resulting from any Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of hazardous substances after the Effective Date of this Consent Decree;

d. liability for injunctive relief or administrative order enforcement under any federal or State statute;

e. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry in or regarding the Commencement Bay Environment;

f. additional claims for Natural Resource Damages if conditions, factors or information in the Commencement Bay Environment, not known to the Trustees as of the Effective Date, are discovered that, together with any other relevant information, indicate 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, as of the Effective Date, which is attributable to any Defendant (for purposes of this Subparagraph, information known to the Trustees shall consist of any information in the files of, or otherwise in the possession of, any one of the individual Trustees, or their contractors or consultants who worked on the Trustees' natural resource damages assessment and liability allocation projects);

g. criminal liability to the United States or State; and

h. claims in this action or in a new action based on a failure of Defendants to satisfy the requirements of this Consent Decree.

56. The Parties acknowledge that post-remedial monitoring in the Thea Foss and Wheeler-Osgood Waterways has shown that some level of recontamination of remediated areas of waterway sediments is occurring and that the recontamination is evidence that there are on-going sources of hazardous substances to the waterways. Defendants assert that none of them is a significant on-going source of such recontamination, and the Trustees agree that they have no information indicating that any Defendant is a significant on-going source of hazardous substances to the waterways. The Parties agree the Defendants' assertions, and the Trustees' lack of contrary information, shall constitute the information regarding the status of Thea Foss Waterway contamination that is known to the Trustees as of the Effective Date for purposes of the preceding Paragraph.

### XXIII. COVENANT NOT TO SUE BY DEFENDANTS

57. Each Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe or their contractors or employees, for any civil claims or causes of action relating to Natural Resource Damages.

### XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

58. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person or entity 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 they each may have with respect to any matter, transaction, or occurrence relating in any way to the Commencement Bay Environment against any person or entity not a Party hereto.

59. The Parties agree, and by entering this Consent Decree this Court finds, that each Defendant is 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 Natural Resource Damages, provided, however, that if the Trustees exercise their rights under the reservations in Section XXII (Reservation of Rights) with regard to any Defendant, such Defendant will no longer be entitled to protection from such contribution actions or claims for Natural Resource Damages as are within the scope of the exercised reservation.

60. Each Defendant agrees that it will notify the Trustees and the United States in writing no later than 60 days before bringing a suit or claim for contribution for Natural

Resource Damages. Each Defendant also agrees that it will notify the Trustees and the United States in writing within 15 days of service of a complaint or claim upon them relating to a suit or claim for contribution for Natural Resource Damages. In addition, each Defendant will notify the Trustees and the United States within 15 days of service or receipt of any Motion for Summary Judgment and within 15 days of receipt of any order from a court setting a case for trial for matters related to this Decree.

61. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for injunctive relief, recovery of response costs, or other appropriate relief other than Natural Resource Damages, no Defendant shall assert, and nor may it 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 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 54 and 57.

#### XXV. NOTICES AND SUBMISSIONS

62. Whenever notice is required to be given or a document is required to be sent by one Party to another under the terms of this Decree, it will 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. Written notice as specified constitutes complete satisfaction of any written notice requirement of the Decree for Plaintiffs and Defendants.

As to the United States and as to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
(DJ # 90-11-2-1049)

As to NOAA:

Robert A. Taylor  
NOAA Office of General Counsel GCNR/NW  
7600 Sand Point Way NE  
Seattle, WA 98115-0070

As to the United States Department of the Interior:

Jeff Krausmann  
U.S. Fish & Wildlife Service  
510 Desmond Dr. SE, Suite 102  
Lacey, WA 98503-1263

As to the State:

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

As to the Puyallup Tribe of Indians:

Bill Sullivan  
Environmental Department  
Puyallup Tribe of Indians  
1850 Alexander Avenue  
Tacoma, WA 98421

As to the Muckleshoot Indian Tribe:

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

As to [DEFENDANT 1].:

\*\*\*\*

As to [DEFENDANT 2, etc.]:

\*\*\*\*

#### XXVI. EFFECTIVE DATE

63. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court into the record of the above-captioned matter.

#### XXVII. RETENTION OF JURISDICTION

64. This Court will retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Decree.

#### XXVIII. INTEGRATION/APPENDICES

65. This Decree and its appendices constitute the final, complete, and exclusive agreement and understanding with respect to the settlement embodied in this Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree. The following appendices are attached to and incorporated into this Consent Decree:

Appendix A Countyline Project Project Description



Appendix B Wheeler-Osgood Site Description

Appendix C Wheeler-Osgood Site deed restrictions

Appendix D Order Directing the Deposit of Natural Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No. C93-5462B (W.D. Wash. Oct. 8, 1993)

Appendix E Countyline Project Site deed restrictions

Appendix F Form of Project Completion Accounting

#### XXIX. MODIFICATION

66. No material modifications shall be made to any requirement under this Consent Decree without written notification to and written approval of the United States Department of Justice and the Trustees, Defendants 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 Defendants. 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 and Defendants. The following modifications shall be deemed not to materially alter the terms of this Consent Decree or the appendices incorporated herein:

- a. Extensions of deadlines contained in Appendix A, provided that the total of such extensions shall equal one year or less;
- b. Project design changes that increase the Countyline Project scale, or that decrease the Project scale by no more than 10% (ten percent) of the Project's area; or

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

### XXX. ENFORCEMENT

67. 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.

### XXXI. TERMINATION

68. This Decree as it applies to each Defendant shall terminate upon written notice, made in accordance with Section XXV, by Defendants to all Plaintiffs that all affirmative actions required under Section VIII, IX and XIII have been taken, all payments required under Sections XV (and under Sections XVI and XVIII, if applicable) have been made and all other applicable requirements of this Decree have been fulfilled, and subsequent written notice by the United States confirming the performance by Defendants of their obligations under this Decree. Such notice by the United States shall be sent within 45 calendar days of receipt by all Plaintiffs of the required payments and notice from Defendants. If the United States fails to send such notice, this Decree shall terminate automatically on the 46<sup>th</sup> day following receipt by all Plaintiffs of the required payments and notice from Defendant. The following provisions of this Decree shall survive termination: Paragraph 16 (actions on Project Site or adjacent properties); Section X (“Access to Information and Project Site”); Section XIII (“Preservation of “Wheeler-Osgood Site”); (Section XXI (“Covenant Not to Sue by Plaintiffs”); Section XXII (“Reservations of Rights”); Section XXIII (“Covenant Not to Sue by Defendants”); and Section XXIV (“Effect of

Settlement; Contribution Protection”).

#### XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

69. This Decree will be lodged with the Court for a period of not less than 30 days for public notice and comment. The Plaintiffs each reserve the right to withdraw or withhold their consent if the comments regarding the Decree disclose facts or considerations that indicate this Decree is inappropriate, improper, or inadequate. Each Defendant consents to the entry of this Decree without further notice.

70. If for any reason this Court does not approve this Decree in the form presented, this agreement may be voided 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.

#### XXXIII. SIGNATORIES/SERVICE

71. The Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice and each undersigned representative of the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and each Defendant certifies that he or she is authorized to enter into the terms and conditions of this Decree and to execute and bind legally the Party that he or she represents to this document.

72. Each Defendant agrees not to oppose entry of this Decree by this Court or to challenge any provision of this Decree unless any Plaintiff has notified Defendant in writing that it no longer supports entry of the Decree.

73. Each Defendant will identify on the attached signature page the name and address of an agent who is authorized to accept service of process by mail on behalf of it with respect to all matters relating to this Decree. Each Defendant agrees 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; provided that such agreement and waiver is effective only as to such matters as may relate to or arise out of this Decree, and not as to any other matter.

**XXXIV. FINAL JUDGMENT**

74. Upon approval and entry of this Decree by the Court in the record of the above-captioned matter, this Decree will constitute the final judgment between and among the United States, the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, each Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_ DAY OF \_\_\_\_\_ 2013.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, *et al.* v. [DEFENDANT 1], *et al.*

FOR THE UNITED STATES OF AMERICA

Date: \_\_\_\_\_

[[ \_\_\_\_\_ ]]

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

FOR THE STATE OF WASHINGTON

Date: \_\_\_\_\_

\_\_\_\_\_

Date : \_\_\_\_\_

\_\_\_\_\_

Assistant Attorney General  
State of Washington

FOR THE PUYALLUP TRIBE OF INDIANS

Date: \_\_\_\_\_

\_\_\_\_\_

FOR THE MUCKLESHOOT INDIAN TRIBE

Date: \_\_\_\_\_

\_\_\_\_\_

FOR [DEFENDANT 1]

Date: \_\_\_\_\_

Agent authorized to receive service of process by mail on behalf of [DEFENDANT 1] with respect to all matters relating to this Decree:

4826-7686-2999, v. 1

**EXHIBIT 4 Part 1**

**APPENDIX E-2**

When Recorded Mail To:

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

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**DECLARATION OF LAND USE RESTRICTION  
AND REAL PROPERTY COVENANT**

Declarant: The King County Department of Natural Resources and Parks.

The Beneficiaries: the United States National Oceanic and Atmospheric Administration, the United States Department of the Interior, the State of Washington Department of Ecology, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe.

Assessor's Tax Parcel ID#: [List]

This Declaration of Land Use Restriction and Real Property Covenant ("Real Property Covenant") is made this \_\_\_\_\_ day of \_\_\_\_\_ 2013, by the King County Department of Natural Resources and Parks ("Declarant"), for the benefit of the United States National Oceanic and Atmospheric Administration, the United States Department of the Interior, the State of Washington Department of Ecology, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe, ("Beneficiaries").

WHEREAS, the Declarant makes the following recitals:

A. Declarant is the sole owner in fee simple of the real property located in King County, Washington, and Pierce County, Washington, legally described in Exhibit A (the "Property"), attached hereto and incorporated herein. A map of the property is attached to and made part of this Real Property Covenant, as Exhibit B.

B. Pursuant to its status as Service Provider to the King County Flood Control Zone District ("District") under an interlocal agreement between King County and the District, Declarant is implementing the Countyline Acquisition and Levee Setback Project, a project that involves reconnection of a currently disconnected portion of the White River floodplain for both flood protection and habitat restoration purposes ("Project"). The

Project involves a combination of property acquisition, levee modification and floodplain restoration along the left (east) bank of the White River, between river mile 5.0 and 6.3.

C. For the purposes of implementing the Project, Declarant has obtained the ownership of the fee interest in a number of properties constituting the Property and wishes to subject and bind such properties in perpetuity to the terms of this Real Property Covenant.

D. The Beneficiaries are trustees for natural resources and have filed a complaint against a number of Potentially Responsible Parties (“PRPs” or “Defendants”), in the United States District Court, Western District of Washington at Tacoma, Civil No: \_\_\_\_\_ for natural resource damages. The Beneficiaries and the Defendants have reached a settlement of the claims in Civil No. \_\_\_\_\_ under the terms of a Consent Decree, entered in Civil No. \_\_\_\_\_ as approved by the Court (“Consent Decree”). The Parties to the Consent Decree have identified the Project as providing significant ecological benefits such that it qualifies to partially satisfy the mitigation obligations of Defendants for natural resource damages under the terms of the Consent Decree. In accordance with this, the Defendants have provided significant funding for the Project to meet their mitigation obligations. In order to ensure that the Project meets the performance standards and other obligations contained in the Consent Decree, the Beneficiaries have required that the Property be subject to this Real Property Covenant, which binds the properties constituting the Property to the restrictions and requirements as set forth herein.

NOW, THEREFORE, in consideration of the above and the covenants, terms, conditions and restrictions contained herein, Declarant, does hereby establish a real property covenant on the Property as follows:

1. *The Recitals*

The above Recitals are a material part hereof and are incorporated herein by this reference.

2. *Declaration of Real Property Covenant*

Declarant voluntarily establishes this Real Property Covenant in perpetuity over the Property in the terms and conditions set forth herein for the purpose of binding the Property in perpetuity to the restrictions and requirements contained in Paragraph 14 and 16 of the Consent Decree, as set forth below, and Appendix A of the Consent Decree.

3. *Purpose*

It is the purpose of this Real Property Covenant to ensure that the Property will be retained forever in a natural condition in accordance with its flood protection and habitat restoration purposes and to prevent any use of the Property that will impair or interfere



with these purposes. Declarant and the Beneficiaries intend that this Real Property Covenant will confine the use of the Property to such activities as are consistent with the purposes of this Real Property Covenant.

4. *Rights of the Beneficiaries*

The Beneficiaries, also known as Trustees, are granted the following rights under this Real Property Covenant, as also provided in Paragraph 25 and Appendix A of the Consent Decree:

From and after the effective date of the Consent Decree, the Trustees and their contractors shall have access at all reasonable times to the Property for the oversight or implementation of the Consent Decree. Where the property to which access is sought is not otherwise open to public access, the Trustees shall give notice to King County 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 the Consent Decree, including, but not limited to:

(a) Monitoring and assessing progress on the planning, development, maintenance and monitoring of the Countyline Project;

(b) Verifying any data or information submitted to the Trustees by the PRPs;

(c) Inspecting and copying records, operation logs, contracts or other documents maintained or generated by King County or its contractors hereafter retained to perform work undertaken pursuant to Appendix A of the Consent Decree;

(d) Conducting such tests, investigations or sample collections as deemed necessary to monitor compliance with the Consent Decree or to assist in further identifying and quantifying injuries requiring natural resource restoration actions and in planning and carrying out maintenance actions as provided in Subparagraph (f);

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

(f) Undertaking any maintenance action as the Trustees determine appropriate. Such maintenance actions shall only be taken with the approval of King County, which approval may be withheld only upon a showing that the proposed action would be inconsistent with the purposes of the Project as described in Appendix A of the Consent Decree (including the Project's flood control purposes), would be inconsistent with other provisions of the Consent Decree or other applicable law, or would impose costs or additional liability upon King County. For the purposes of this subparagraph (f), "maintenance" does not include any repair, modification, or alteration that changes the ecological function, character, scope or size of the Project as described in Appendix A.

5. *Prohibited Uses*

Any activity on or use of the Property inconsistent with the purposes of this Real Property Covenant is prohibited.

6. *Reserved Rights*

Declarant reserves any use of, or activity on, the Property that is not inconsistent with the purpose of the real property covenant and that is not prohibited herein. Without limiting the generality of the foregoing, Declarant specifically reserves the following uses and activities:

(a) *Emergencies.* The right to undertake other activities necessary to protect public health, property improvements, or human safety, or which are actively required by and subject to compulsion of any governmental agency with authority to require such activity.

(b) *Fence.* The right to install and maintain fences on the perimeter of the Property; any other fencing is permissible, following prior notice to and consultation with the Beneficiaries regarding the location, design and construction of the fences, and the Beneficiaries agree not to remove or damage said fences.

7. *Responsibilities of Declarant Not Affected.*

Other than as specified herein, this Real Property Covenant is not intended to impose any legal or other responsibility on the Beneficiaries, or in any way to affect any existing obligation of the Declarant as owner of the Property.

8. *Notice of Transfer of Property by Declarant and Successor and Assigns*

In the event that the Property itself, or any interest in it, is transferred by the Declarant to a third party, the Declarant, its successors and assigns, shall notify the Beneficiaries in writing, and the document of conveyance shall expressly refer to this Real Property Covenant.

9. *Modification*

This Real Property Covenant may be amended only with the concurrence of all of the Beneficiaries, provided that any such amendment shall be consistent with the purpose of this Real Property Covenant and shall not affect its perpetual duration. All amendments shall be in writing, approved by the Beneficiaries and recorded in the real property records of both King and Pierce County.

10. *Interpretation*

This Real Property Covenant shall be interpreted under the laws of Washington, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation purposes.

11. *Perpetual Duration*

This Real Property Covenant shall be a binding servitude running with the land in perpetuity.

12. *Notices*

Any notices required by this Real Property Covenant shall be in writing and shall be personally delivered or sent by first class mail to the Declarant, at the following address, unless the Beneficiaries have been notified of a change of address.

To Declarant:

Director, Water and Land Resources Division  
201 South Jackson Street, Suite 600  
Seattle, Washington 98104

13. *Severability*

If any provision of this Real Property Covenant is found to be invalid, illegal or unenforceable, that finding shall not affect the validity, legality or enforceability of the remaining provisions.

In Witness Whereof, the Declarant has set its hand on the date first written above.

Declarant:

[Name]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF WASHINGTON )  
 ) ss  
County of \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 2013, before me the undersigned, a Notary Public for the State of Washington, personally appeared \_\_\_\_\_ who stated on oath that (he/she) is the \_\_\_\_\_ of [Name] and authorized to execute the within instrument on behalf of said company and acknowledged said instrument as the free and voluntary act of the company for the uses and purposes mentioned therein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

\_\_\_\_\_  
Notary Public for the State of Washington  
Residing at \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

4814-9819-8551, v. 1

**EXHIBIT 4 Part 2**

**AFTER PIERCE COUNTY RECORDING RETURN TO:**

King County Water and Land Resources Division  
201 S. Jackson St. Ste. 600  
Seattle, WA 98104

**Document Title:** River Protection Easement

**Reference Number of Related Document:**

**Grantor(s):** Pierce County

**Grantee(s):** King County

**Abbreviated Legal Description:** Pt. East ½ NW ¼ & Pt. NW ¼ NE 1/4 , Sec. 1, T20N, R4E

**Full Legal Description** – See Exhibit A

**Assessor's Tax Parcel Number:** N/A

**RIVER PROTECTION EASEMENT**

For mutual benefits and other good and valuable consideration, receipt of which is hereby acknowledged, the GRANTOR, Pierce County, a political subdivision of the State of Washington, owner in fee of that certain parcel of land (the "Property"), legally described as set forth in Attachment A, incorporated herein and made a part hereof, hereby grant(s) to KING COUNTY, a political subdivision of the State of Washington , its successors and assigns, agents and licensees (GRANTEE), a perpetual easement for the purposes of accessing and constructing, inspecting, monitoring, reconstructing, maintaining and repairing, river bank protection, levees and/or other flood related works, including installing, inspecting and maintaining all vegetation, environmental restoration measures and any other appurtenances thereto, across, in, under, on, over and upon the left bank of the White River of the above described Property ("Easement Area"), as constructed or reconstructed, together with reasonable ingress and egress upon the Property to access the Easement Area.

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Grantor further grants access to the Easement Area to the Trustees under that certain Consent Decree filed in United States, et al. v. Advance Ross, et al. filed in the United States District Court, Western District of Washington at Tacoma, Civil No. \_\_\_\_\_, for the purposes of fulfilling the rights and responsibilities of the Trustees under the Consent Decree, and to ensure that the Easement Area will be retained forever in a natural condition in accordance with its flood protection and habitat restoration purposes and to prevent any use of the Property that will impair or interfere with these purposes.

Grantee shall have the right at such time as may be necessary and at the Grantee's sole discretion, to enter upon the Property and to have unimpeded access to, in and through the Easement Area for the purposes of exercising the Grantee's rights as described herein.

Grantor agrees not to plant non-native vegetation within the Easement Area and not to remove or otherwise alter any improvements installed by Grantee, including any native vegetation that may be planted and any flood protection works that may be constructed, within the Easement Area, without the prior approval of Grantee. Nothing contained herein shall be construed as granting any license, permit or right, otherwise required by law, to Grantor with respect to the Property and the Easement Area.

For the purposes of this river protection easement, the term "native vegetation" shall mean vegetation comprised of plant species, other than noxious weeds (as identified on the State of Washington noxious weed list found at Washington Administrative Code Chapter 16-750, as amended from time to time), which are indigenous to the coastal region of the Pacific Northwest and which reasonably could have been expected to naturally occur at the site.

Neither Grantor nor Grantee is hereby obligated to future maintenance, repair or other action related to the above-described exercise of easement rights. Unless specifically stated herein, this river protection easement and/or any flood related works constructed or to be constructed within the Easement Area shall not be construed as granting any rights to any third person or entity, or as a guarantee of any protection from flooding or flood damage, and nothing contained herein shall be construed as waiving any immunity to liability granted to Grantee by any state statute, including Chapters 86.12 and 86.15 of the Revised Code of Washington, or as otherwise granted or provided for by law.

The rights, conditions, and provisions of this easement shall inure to the benefit of and be binding upon the heirs, executors, administrators, and successors in interest and assigns of Grantor and Grantee.

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GRANTOR

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF PIERCE )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_, of Pierce County, a political subdivision of the State of Washington, that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said County, for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument.

WITNESS my hand and official seal hereto the day and year in this certificate first above written.

\_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington, residing  
at \_\_\_\_\_  
My commission expires \_\_\_\_\_

## Attachment A

**LEGAL DESCRIPTION:** Real property in the County of Pierce, State of Washington, described as follows:

### Parcel A:

All of that part of the East Half of the Northwest Quarter of Section 1, Township 20 North, Range 4 East, W.M., in Pierce County, Washington on the West side of the Stuck River and lying East of a line described as follows:

Beginning at a point on the township line between Township 20 North, Range 4 East, W.M. and Township 21 North, Range 4 East, W.M., which said point of beginning is 212.3 feet West of the Northeast corner of said East Half of said Northwest Quarter of said Section 1

Thence South 26°27' West, a distance of 1040 feet;

Thence South 20°35'15" West, a distance of 631 feet;

Thence South 14°43'30" West 1080 feet.

### Parcel B:

That part of the East Half of the Northwest Quarter of Section 1, Township 20 North, Range 4 East, W.M., in Pierce County, Washington described as follows:

Beginning at a point on the West right of way line of the proposed new river channel of said Inter-County River Improvement, which said point is 1190 feet West and 130 feet North of the center of Section 1, Township 20 North, Range 4 East, W.M.;

Thence East 434.26 feet to the East right of way line of said proposed new river channel;

Thence Northerly along said East right of way line North 14°43'30" East 970 feet;

Thence North 20°35'15" East 545 feet;

Thence North 26°27' East 520 feet;

Thence West 256 feet more or less to intersect a line drawn from the North Quarter corner of said Section 1 to the center of the West Half of said Section 1 Township 20 North, Range 4 East, W.M.;

Thence Southwesterly along said line, 1730 feet more or less to its intersection with the West right of way line of said proposed new river channel;

Thence South 14°43'30" West along said West right of way line, 370 feet more or less to the place of beginning.

### Parcel C:

That part of the Northeast Quarter of the Northeast Quarter of the Northwest Quarter and the Northwest Quarter of the Northwest of the Northeast Quarter of Section 1, Township 20 North, Range 4 East, W.M., Pierce County, Washington described as follows:

Beginning at a point on the township line between Township 20 North, Range 4 East, and Township 21 North, Range 4 East, W.M., which is 2640 feet more or less West of the Northeast corner of Section 1, Township 20 North, Range 4 East, being the North Quarter corner of said Section 1;

Thence East 265 feet more or less to East right of way line of the proposed new river channel;

Thence South 26°27' West along said East right of way line 740 feet more or less to its intersection with the South line of the Northeast Quarter of the Northeast Quarter of the Northwest Quarter of said Section 1;

Thence West along said line 255 feet to a line joining the North Quarter corner of Section 1 and the center of the West Half of said Section 1;

Thence Northeasterly along said line to place of beginning.

### Parcel D:



A strip of land 100 feet in width across the Southerly portion of that certain tract of land in Pierce County, Washington, described as beginning at the Northeast corner of the Northwest Quarter of Section 1, Township 20 North, of Range 4 East, W.M. and running thence South to the Southeast corner of said Northwest Quarter said Section 1;  
Thence West to the Southwest corner of the Southeast Quarter of said Northwest Quarter of said Section 1;  
Thence in a Northerly direction to the point of beginning, said 100 foot strip of land lying North of and immediately adjoining and being parallel to the county road, as now established across said Section 1.



## EXHIBIT 5

### ESCROW AGREEMENT

This ESCROW AGREEMENT is entered into on this \_\_\_\_\_ day of \_\_\_\_\_ 2014, by and among the parties identified in Exhibit A attached hereto (“Parties”).

(a) WHEREAS, the Contributing Parties have been named as Potentially Responsible Parties by the Natural Resource Trustees for the Commencement Bay Environment (“Trustees”) for alleged natural resource injuries and injury assessment costs incurred at the Thea Foss and Wheeler-Osgood Waterways within the Commencement Bay Nearshore/Tideflats Superfund Site in Tacoma, Washington.

(b) WHEREAS, the Contributing Parties have engaged in an allocation mediation process conducted by Mr. William J. Hengemihle of FTI Consulting, Inc. and, as a result of that process, have agreed to resolve the Trustees’ claims through a Consent Decree to be entered in the United States District Court for the Western District of Washington and styled *United States of America v. Advance Ross, et al.*

(c) WHEREAS, under the terms of the Consent Decree, upon entry the Contributing Parties are required to, among other things, undertake the following: (1) make certain payments to the Trustees; (2) provide funds and services and ensure that all necessary steps are taken to construct and monitor a flood control and habitat restoration project defined in the Consent Decree as the “Countyline Project”; and (3) preserve certain lands within the Thea Foss and Wheeler-Osgood Waterways, as defined in the Consent Decree as the “Wheeler-Osgood Site,” for natural resource habitat purposes.

(d) WHEREAS, the Contributing Parties intend to satisfy their obligations under the Consent Decree for all matters pertaining to the Countyline Project by entering into an agreement with King County, a political subdivision of the State of Washington, and King County Flood Control Zone District, a quasi-municipal corporation of the State of Washington, which agreement is known as the “Funding Agreement” and is being signed by the Parties concurrently with this Escrow Agreement.

(e) WHEREAS, the Contributing Parties have agreed to allocate their joint obligations under the Consent Decree and Funding Agreement by entering into an agreement known as the “Thea Foss Waterway NRD Consent Decree Side Agreement” (hereafter “Side Agreement”), which is being signed by the Parties concurrently with this Escrow Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants contained herein, the Parties hereto agree as follows:

#### AGREEMENT

1. Establishment of Escrow Account.

The Parties hereby appoint Mr. William J. Hengemihle (or his designee), FTI Consulting, Inc., 1255 Drummers Lane, Suite 320, Wayne, Pennsylvania, as the Escrow Agent to perform the duties set forth in this Escrow Agreement. This Escrow Agreement is being signed concurrently with the Consent Decree.

2. Terms of Escrow.

Payments by the Parties shall be made in the amounts specified at Exhibit A to the Side Agreement and delivered to the Escrow Agent. All payments shall be made payable to the Thea Foss Waterway NRD Settlement Escrow Account. Signed signature pages to the Consent Decree, Funding Agreement, and Side Agreement shall also be delivered to the Escrow Agent,

but signed signature pages to the Consent Decree shall not be submitted to the Trustees until the Escrow Agent has received signed signature pages from all of the Parties to said agreements and deposited and made available for disbursement all of the payment amounts required under the Side Agreement. The Escrow Agent shall hold such funds in a noninterest-bearing account at TD Bank, N.A. until such time that the Consent Decree is entered by the Court, subject to the following:

(a) if the Consent Decree is entered by the Court, the funds held in the Escrow Account, which shall total \$ \_\_\_\_\_, shall be disbursed as follows:

- i. \$4,775,000 shall be paid to King County, consistent with the provisions of Paragraph 7 of the Funding Agreement.
- ii. \$50,000 shall be paid to Trustees for restoration oversight costs, consistent with the provisions of Paragraphs 28 and 35 of the Consent Decree.
- iii. \$ \_\_\_\_\_ shall be paid to the Trustees as a contribution to the Trustees' long-term oversight and stewardship activities, consistent with the provisions of Paragraphs 34 and 35 of the Consent Decree.
- iv. \$ \_\_\_\_\_ shall be paid to the Trustees for the reimbursement of natural resource damage assessment costs, consistent with the provisions of Paragraph 36 of the Consent Decree. Payments to individual Trustees shall be made as follows:

National Oceanic and Atmospheric Administration  
Amount: \$ \_\_\_\_\_

U.S. Department of Interior  
Amount: \$ \_\_\_\_\_

State of Washington  
Amount: \$ \_\_\_\_\_

Puyallup Tribe of Indians  
Amount: \$ \_\_\_\_\_

Muckleshoot Indian Tribe

Amount: \$ \_\_\_\_\_

- v. \$ \_\_\_\_\_ shall be paid to Gull Industries, Inc., a Party hereto, consistent with Exhibit A to the Side Agreement.
- vi. \$ \_\_\_\_\_ shall be paid to McFarland Cascade, a Party hereto, consistent with Exhibit A to the Side Agreement.

(b) if the Consent Decree is not approved by the Court, all funds paid by each Party to the Escrow Agent shall be returned to that Party.

3. Rights and Duties of Parties.

(a) The duties of the Escrow Agent shall be entirely administrative and not discretionary.

(b) The Escrow Agent shall have no liability hereunder to the Parties in otherwise acting or failing to act under this Escrow Agreement, except for willful misconduct or gross negligence. The Parties agree to and hereby do waive any suit, claim, demand or cause of action of any kind which it may have or may assert against the Escrow Agent arising out of or relating to its performance hereunder, unless such suit, claim, demand or cause of action is based upon the willful misconduct or gross negligence of the Escrow Agent.

(c) The Parties further agree to indemnify and hold harmless Escrow Agent from and against any and all claims, demands, costs, liabilities and expenses, including reasonable counsel fees, which may be asserted against Escrow Agent or to which Escrow Agent may be exposed by reason of its performance hereunder, except for willful misconduct or gross negligence of Escrow Agent.

(d) The Escrow Agent shall have no duty to inquire or to determine the authenticity, accuracy, validity or sufficiency of any signature, direction, notice, demand, waiver, instruction, consent, or other paper or document given or delivered to it hereunder. Except for

the Escrow Agent's gross negligence or willful misconduct, the Escrow Agent shall not incur any liability in acting in accordance with and pursuant to any signature, direction, notice, demand, instruction, waiver, consent or other paper or document believed by the Escrow Agent to be genuine.

(e) The terms and provisions of this Escrow Agreement shall create no right in any person, firm or corporation other than the Parties and their respective successors and assigns and no third party shall have the right to enforce or benefit from the terms hereof.

(f) No Party may assign, pledge, hypothecate, transfer, create a security interest in or to the Payment(s) or otherwise create or grant to anyone else a right to demand or receive the Payment(s) or any portion thereof, and any instrument, notice or other demand or directive to do so shall be null and void and of no force and effect, and may be disregarded by the other Parties hereto without liability.

4. Termination.

Upon satisfaction of the terms of this Escrow Agreement as described above, this Escrow Agreement shall be terminated and no further services will be required by the Escrow Agent.

5. Jurisdiction.

This Escrow Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

6. Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

ESCROW AGENT:

---

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

\_\_\_\_\_

DATE: \_\_\_\_\_



PARTIES:

\_\_\_\_\_

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

\_\_\_\_\_

DATE: \_\_\_\_\_

