

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, )  
STATE OF WASHINGTON THROUGH )  
THE WASHINGTON DEPARTMENT )  
OF ECOLOGY, SUQUAMISH TRIBE, )  
AND TULALIP TRIBES, )

Plaintiffs, )

v. )

PORT OF EVERETT, )

Defendant. )

Civil Action No.:

2:19-cv-843

**CONSENT DECREE**

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UNITED STATES DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
P.O. Box 7611, Washington, D.C. 20044-7611  
202-514-5270

**I. BACKGROUND**

A. The Plaintiffs have filed a complaint in this matter against the Port of Everett (“Settling Defendant” or “Port”) pursuant to the Model Toxics Control Act (“MTCA”), chapter 70.105D RCW; chapter 90.48 RCW; Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702(b)(2)(A) for Natural Resource Damages as a result of releases of hazardous substances and discharges of oil into the Port Gardner Bay Area. Potential claims of the non-federal Trustees against the United States on behalf of the Settling Federal Agency are deemed filed and some or all of the allegations in such claims are deemed denied. The Port Gardner Bay Area (as defined below and depicted in Appendix A) includes the lower Snohomish River, Everett Waterfront, East Waterway, and a portion of Possession Sound in and near Everett, Washington. Several industrial facilities – including those owned and/or operated by the Settling Defendant and owned and/or operated by the Settling Federal Agency, identified in Appendix B – have contributed hazardous substances and oil to the Port Gardner Bay Area. This Consent Decree (the “Decree”) addresses the claims asserted in the Complaint against the Port and potential claims against the Settling Federal Agency.

B. The United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (“NOAA”); the United States Department of the Interior; the Washington Department of Ecology on behalf of the State of Washington (“State”); the Suquamish Tribe; and the Tulalip Tribes, (collectively, “the Trustees” and, individually, a “Trustee”), under the authority of Section 107(f) of the Comprehensive Environmental

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1 Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(f); Section 1006(b)  
2 of OPA, 33 U.S.C. § 2706(b); 40 C.F.R. Part 300, subpart G; and RCW 70.105D.040(2), serve as  
3 trustees for Natural Resources for the assessment and recovery of damages for injury to,  
4 destruction of, or loss of Natural Resources under their trusteeship.

5 C. Investigations conducted by the Trustees and others have detected hazardous  
6 substances in the sediments, soils and groundwater of the Port Gardner Bay Area, including, but  
7 not limited to, polychlorinated dibenzodioxins and furans ("dioxins"), polychlorinated biphenyls  
8 ("PCBs"), organochlorine pesticides and related products, polycyclic aromatic hydrocarbons  
9 ("PAHs"), metals (including lead, mercury, copper, chromium, and arsenic), volatile and semi-  
10 volatile organic compounds (including 4-methylphenol), perchlorate, herbicides, organic  
11 solvents, antifouling agents such as tributyltin and other butyltins, and wood waste degradation  
12 products (including sulfide and ammonia).

13 D. Plaintiffs allege that hazardous substances and oil released to the Port Gardner  
14 Bay Area from facilities owned and/or operated by Settling Defendant and facilities owned  
15 and/or operated by the Settling Federal Agency, identified in Appendix B, have caused injury to,  
16 destruction of and loss of Natural Resources under Plaintiffs' trusteeship, including fish,  
17 shellfish, wildlife, marine sediments, and resources of cultural significance. Plaintiffs further  
18 allege that each of them and the public have suffered the loss of natural resource services  
19 (including ecological services as well as direct and passive human use losses) as a consequence  
20 of those injuries.

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1 E. Although the Trustees initiated but have not completed a full natural resource  
2 damage assessment for the Port Gardner Bay Area, the Trustees have developed and analyzed  
3 information sufficient to support a settlement that is fair, reasonable and in the public interest.

4 F. The Trustees issued a Damage Assessment Restoration Plan and Environmental  
5 Assessment for the Port Gardner Bay Area in August 2016, which the Trustees adopted as final  
6 in October 2016 after a public comment period, selecting the Blue Heron Slough Restoration  
7 Project ("Restoration Project" or "Project") as the preferred alternative to restore, replace, and/or  
8 acquire the equivalent of injured Natural Resources and services.

9 G. As contemplated by this Consent Decree, the Port will resolve its liability as set  
10 forth in Section XIII by constructing, monitoring and maintaining the Blue Heron Slough  
11 Restoration Project as described in Appendix C. The Project will restore and protect in perpetuity  
12 approximately 338 acres of habitat in the Snohomish River estuary that is highly beneficial to  
13 injured Natural Resources in the Port Gardner Bay Area. As set forth in this Decree and  
14 Appendix C, the Port shall purchase 469.39 natural resource damage restoration credits ("NRD  
15 DSAYs") equivalent to 34.79 acres of the Project Site upon Final Completion of the Project.  
16 The Project will also be a certified conservation bank, maintained in perpetuity by Wildlands of  
17 Washington, LLC, as outlined in the *Puget Sound Salmon, Steelhead, and Bull Trout Umbrella*  
18 *Conservation Bank Agreement* and *Addendum #1, Blue Heron Slough Conservation Bank*  
19 *Agreement* ("Conservation Bank Agreement" or "CBA"), approved by NOAA's National Marine  
20 Fisheries Service on June 18, 2008.

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1           H.       To facilitate the resolution of natural resource damage claims, relying upon the  
2 results of remedial investigations, regulatory standards, and scientific literature, and as set forth  
3 in the final Damage Assessment Restoration Plan and Environmental Assessment, the Trustees  
4 developed an estimate of the amount of injury to Natural Resources that had occurred as a result  
5 of releases of hazardous substances and discharges of oil to the Port Gardner Bay Area. The  
6 Trustees used a metric called discounted service acre-years (“DSAYs”) to quantify the effects of  
7 the injuries in terms of the losses of ecological services over affected areas and over time,  
8 discounted to the current year. The Trustees used DSAYs to describe both the scale of the  
9 injuries, and the amount of habitat restoration they are seeking to compensate for the injuries.  
10 The Trustees first calculated the DSAYs lost due to contamination to the Port Gardner Bay Area,  
11 then calculated the DSAYs associated with the Port’s Restoration Project, determining that  
12 purchase of NRD DSAYs by the Port, described in the preceding paragraph, is sufficient to  
13 resolve the liability of the Port.

14           I.       Consistent with Sections 7.4 and 8.1.3 of the Trustees’ Damage Assessment  
15 Restoration Plan and Environmental Assessment, Port Gardner Bay Trustee Council Resolution  
16 No. 2019-01, and the March 7, 2019, Memorandum of Agreement (“MOA”) between the U.S.  
17 Fish and Wildlife Service, acting on behalf of DOI, the Tulalip Tribes, and Settling Defendant,  
18 after approval and entry of this Decree by the Court, the Trustees anticipate using the natural  
19 resource damages payments received by the Trustees pursuant to the Consent Decree entered in  
20 *United States, et al. v. Jeld-Wen, Inc., et al.*, Civil Action No. 2:18-cv-00113 (W.D. Wash.)  
21 (“Cashout Consent Decree”) to purchase restoration credits in the Blue Heron Slough

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1 Restoration Project equivalent to the 399.74 NRD DSAYs (equivalent to 29.63 acres of the  
2 Project Site) allocated to the Potentially Responsible Parties ("PRPs") that entered into the  
3 Cashout Consent Decree. The purchase of these restoration credits will be in addition to Settling  
4 Defendant's obligation to purchase 469.39 NRD DSAYs, as described in Paragraphs G and 29.

5 J. Plaintiffs assert that hazardous substance releases and oil discharges to the Port  
6 Gardner Bay Area have become dispersed and commingled to the extent that the effects of  
7 releases of one PRP cannot be readily distinguished from another's. Plaintiffs further assert that  
8 the circumstances of the contamination make all PRPs who contributed to the contamination  
9 jointly and severally liable for all injuries to Natural Resources that have resulted from the  
10 contamination. As a consequence, Plaintiffs assert the right to recover for the loss of all the  
11 calculated DSAYs and associated damage assessment costs from any PRP. Without prejudice to  
12 their position and solely for purposes of facilitating settlement with individual PRPs, the  
13 Plaintiffs have determined that settling with the Settling Defendant and the Settling Federal  
14 Agency for a portion of the Natural Resource damages attributable to all Port Gardner Bay Area  
15 sources would result in a fair and equitable resolution of Plaintiffs' claims. The Trustees have  
16 estimated the cash damages equivalent of the DSAYs allocated to Settling Defendant (469.39 of  
17 the 1,019 total DSAYs assessed by the Trustees for the Port Gardner Bay Area) to total  
18 \$4,634,287.47. In lieu of payment of damages, the Port will implement the Restoration Project as  
19 set forth in this Decree. The State and the Tribes have agreed to settle their claims against the  
20 Settling Federal Agency for the equivalent of 80 DSAYs (having a cash damages equivalent of  
21 \$789,840).

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K. The Parties agree, and this Court by entering this Consent 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, that this Decree will expedite the restoration and protection of Natural Resources at and near the Port Gardner Bay Area, that the timely implementation of the Restoration Project and payments to be provided under this Decree constitute appropriate actions necessary to protect and restore the Natural Resources allegedly injured by releases or threatened releases of hazardous substances and discharges of oil by the Settling Defendant and the Settling Federal Agency, and that this Decree is fair, reasonable, and in the public interest.

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

11 II. 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 also has personal jurisdiction over the Settling Defendant. Solely for purposes of this Consent Decree and the underlying Complaint, the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Decree or this Court's jurisdiction to enter and enforce this Decree.

19 **III. PARTIES BOUND**

20           2.       This Consent Decree is binding upon the United States, the State, the Suquamish  
21       Tribe, the Tulalip Tribes, and the Settling Defendant, its successors, and assigns. Any change in

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ownership or corporate or other legal status of Settling Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

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

#### IV. DEFINITIONS

4. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or such regulations. Whenever terms listed below are used in this Decree or its appendices, the following definitions shall apply solely for purposes of this Decree:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

b. "Commerce" shall mean the United States Department of Commerce and its successor departments, agencies, or instrumentalities.

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1 c. "Consent Decree" or "Decree" shall mean this consent decree and all  
2 appendices attached hereto (listed in Section XXI) and any final approved plans required  
3 hereunder. In the event of a conflict between this Consent Decree and any Appendix or plan, the  
4 Consent Decree shall control.

5 d. "Conservation Bank Agreement" or "CBA" shall mean the *Puget Sound*  
6 *Salmon, Steelhead, and Bull Trout Umbrella Conservation Bank Agreement* and *Addendum #1*,  
7 *Blue Heron Slough Conservation Bank Agreement*, approved by NOAA's National Marine  
8 Fisheries Service on June 18, 2008.

9 e. "Day" or "day" shall mean a calendar day. In computing any period of  
10 time under this Consent Decree, where the last day falls on a Saturday, Sunday, or federal  
11 holiday, the period shall run until the close of business of the next working day.

12 f. "Default" shall mean circumstances constituting default as defined in the  
13 Performance Bond attached as Appendix F.

14 g. "DOI" shall mean the United States Department of the Interior and its  
15 successor departments, agencies, or instrumentalities.

16 h. "DSAYs" means discounted service acre-years, the metric established by  
17 the Trustees to quantify the scale of Natural Resource Damages liability associated with the Port  
18 Gardner Bay Area and the natural resource restoration efforts needed to compensate for injury to,  
19 destruction or loss of Natural Resources giving rise to liability.

20 i. "Effective Date" shall mean the date upon which the approval of this  
21 Consent Decree is recorded on the Court's docket.

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1 j. "Federal Trustees" shall mean DOI and Commerce, acting through  
2 NOAA.

3 k. "Final Completion" shall mean the completion of construction of the  
4 Project, as defined in Section 10 of Appendix C.

5 l. "Initial Maintenance and Monitoring" shall mean the maintenance and  
6 monitoring activities during the first ten (10) years after Final Completion, described in Section 7  
7 of Appendix C.

8 m. "Lodging Date" means the date on which this Consent Decree is lodged  
9 with the Court.

10 n. "Long-Term Maintenance and Monitoring" shall mean the maintenance  
11 and monitoring activities during the twenty (20) years after completion of Initial Maintenance  
12 and Monitoring, described in Section 8 of Appendix C.

13 o. "Maintenance and Monitoring" shall mean the maintenance and  
14 monitoring activities during the first thirty (30) years after Final Completion, and includes both  
15 Initial Maintenance and Monitoring and Long-Term Maintenance and Monitoring.

16 p. "MTCA" shall mean the Washington Model Toxics Control Act, Chapter  
17 70.105D RCW.

18 q. "Natural Resource Damages" shall mean any damages, including the  
19 costs of damage assessment, recoverable by the Trustees under Section 107 of CERCLA, 42  
20 U.S.C. § 9607; Chapter 70.105D RCW; Section 311 of the Clean Water Act ("CWA"), 33  
21 U.S.C. § 1321; Chapter 90.48 RCW; and Section 1002(b)(2) of the Oil Pollution Act of 1990

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1 (“OPA”), 33 U.S.C. § 2702(b)(2), for injury to, destruction of, loss of, loss of use of, or  
2 impairment of Natural Resources, including, but not limited to: (i) the costs of assessing such  
3 injury, destruction, or loss or impairment of natural resources; (ii) the costs of restoration,  
4 rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent  
5 resources; (iii) the costs of planning such restoration activities; (iv) compensation for injury,  
6 destruction, loss, impairment, diminution in value, or loss of use of natural resources; and (v)  
7 each of the categories of recoverable damages described in 43 C.F.R. § 11.15, and applicable  
8 State or tribal law, resulting from releases of hazardous substances or discharges of oil to the  
9 Port Gardner Bay Area, where such release or discharge occurred on or before the Effective Date  
10 of this Consent Decree, at the locations identified in Appendix B. Damages, injury to,  
11 destruction of, loss of, loss of use of, or impairment of Natural Resources resulting from releases  
12 of hazardous substances or discharges of oil originating from Settling Defendant’s operations or  
13 activities at properties other than the property identified in Appendix B are not included in  
14 Natural Resource Damages, for purposes of this Decree, even if those hazardous substances or  
15 discharges of oil reach the Port Gardner Bay Area by flowing over, under, or through any portion  
16 of the property identified in this subparagraph.

17           r.       “Natural Resources” shall mean that definition as provided in 42 U.S.C.  
18       § 9601(16).

19           s.       “Parties” shall mean the United States, the State of Washington, the  
20       Suquamish Tribe, the Tulalip Tribes, and the Settling Defendant.

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1                   t.       “Performance Standards” are the standards for performance of the work  
2 for the Project set forth in Appendix C.

3                   u.       “Plaintiffs” shall mean the United States, the State of Washington, the  
4 Suquamish Tribe, and the Tulalip Tribes.

5                   v.       “Port” or “Port of Everett” shall mean the Settling Defendant.

6                   w.       “Port Gardner Bay Area” shall mean the area depicted on Appendix A,  
7 attached, including the lower Snohomish River, Everett Waterfront, East Waterway, and a  
8 portion of Possession Sound in and near Everett, Washington.

9                   x.       “Project” or “Restoration Project” shall mean the Blue Heron Slough  
10 Restoration Project, including all work and other commitments identified in Appendix C.

11                  y.       “Project Abandonment” shall mean a circumstance in which Settling  
12 Defendant, directly or through its contractors, (a) has abandoned construction or has abandoned  
13 Maintenance and Monitoring of the Project, without Trustee permission or approval, or (b) is  
14 seriously and repeatedly deficient in construction or in Maintenance and Monitoring of the  
15 Project in accordance with Appendix C.

16                  z.       “Project Site” shall mean the areas outlined for the Restoration Project as  
17 identified in Appendix C.

18                  aa.      “Settling Defendant” shall mean the Port of Everett.

19                  bb.      “Settling Federal Agency” shall mean the United States Navy and its  
20 successor departments, agencies, or instrumentalities.

21                  cc.      “State” shall mean the State of Washington.

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dd. "Stewardship" shall mean actions intended to preserve, protect or maintain the Project and the Project Site in perpetuity after the completion of Long-Term Maintenance and Monitoring, as required by the Conservation Bank Agreement, including (a) maintaining, restoring or replacing the ecological function of the Projects; and (b) maintaining, restoring or replacing physical components of the Project.

6 ee. "Tribes" shall mean the Suquamish Tribe and the Tulalip Tribes.

7 ff. “Trustees” shall mean Commerce, acting through NOAA; DOI; the  
8 Washington State Department of Ecology, on behalf of the State of Washington; the Suquamish  
9 Tribe; and the Tulalip Tribes.

10 gg. "United States" shall mean the United States of America and each  
11 department, agency, and instrumentality of the United States, including Commerce, acting  
12 through NOAA; DOI; and the Settling Federal Agency.

13                   hh.     “Wildlands” shall mean Wildlands of Washington LLC, a business entity  
14     that, among other things, designs, constructs, and maintains natural resource restoration and  
15     enhancement projects on behalf of persons that are liable for natural resource damages at  
16     properties that have suffered a loss of Natural Resources pursuant to CERCLA. The Port is  
17     working with Wildlands to plan, restore and manage habitat within the Project Site.

18 V. GENERAL PROVISIONS

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

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1           6.       This Consent Decree shall not be used as evidence of Settling Defendant's or  
2       Settling Federal Agency's alleged liability in any action or proceeding other than an action or  
3       proceeding to enforce the terms of this Decree.

4           7.       This Decree is not, and shall not be construed to be, a permit issued pursuant to  
5       any law. Where any portion of the activities undertaken pursuant to this Decree requires a  
6       federal, state or local permit or approval, Settling Defendant shall submit timely and complete  
7       applications and take all other actions necessary to obtain such permits or approvals. Settling  
8       Defendant may not seek relief under the provisions of Section X (Force Majeure) of this Decree  
9       for any delay in the performance of the Project resulting from a failure to obtain, or a delay in  
10      obtaining, any permit or approval required for the Project.

11          8.       Settling Defendant shall ensure that all work performed under this Decree shall be  
12      conducted as set forth in Appendix C to achieve the objective of constructing and maintaining  
13      the Project to meet the Performance Standards identified in Appendix C. If the Trustees  
14      determine that Settling Defendant is not complying with the requirements set forth in the Decree,  
15      including Appendix C, the Trustees shall provide written notice to Settling Defendant specifying  
16      the basis for their determination of noncompliance. Settling Defendant may correct the  
17      noncompliance or invoke the dispute resolution procedures set forth in Section XI. The Trustees  
18      may require Settling Defendant to take actions to alter, suspend or cease ongoing activities, and  
19      to alter, postpone or refrain from taking proposed actions, as are necessary to ensure compliance  
20      with the terms of this Decree and any plans or proposals adopted hereunder. If Settling  
21      Defendant disputes any such requirements imposed by the Trustees, the Settling Defendant may

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1 invoke the dispute resolution procedures set forth in Section XI. Notwithstanding the foregoing,  
2 if in connection with the noncompliance the Trustees seek to exercise one of the performance  
3 guarantees in Section VI.F, the procedures described in Paragraph 26 will control.

4 9. The Plaintiffs do not, by their consent to the entry of this Decree, warrant or aver  
5 in any manner that Settling Defendant's compliance with this Decree will result in compliance  
6 with CERCLA or any other law. Compliance with this Decree does not diminish or affect  
7 Settling Defendant's responsibility to comply with any applicable federal, state, tribal or local  
8 law or regulation. The Parties agree that Settling Defendant is responsible for achieving and  
9 maintaining complete compliance with all applicable federal, state, tribal and local laws,  
10 regulations and permits (including those related to Settling Defendant's operation, maintenance  
11 and repair of the I-5 Dike identified in Sections 6.1, 8.2 and 10.1 of Appendix C).

12 **VI. PERFORMANCE OF RESTORATION PROJECT BY SETTLING DEFENDANT**

13 10. Settling Defendant shall fund and perform all activities required for design,  
14 construction, and Maintenance and Monitoring of the Blue Heron Slough Restoration Project, in  
15 accordance with the requirements and schedule set forth in Appendix C, and shall make  
16 arrangements for Stewardship of the Project in accordance with the Conservation Bank  
17 Agreement. The Parties stipulate that the time period for implementing the Project is a  
18 significant factor in the settlement reached in this Decree and that delay in carrying out the  
19 activities required in this Decree may diminish the compensatory value attributable to those  
20 activities.

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**A. Design and Construction of the Blue Heron Slough Project**

11. Settling Defendant shall reach Final Completion of the Project by no later than four years after the Effective Date of this Decree. If Settling Defendant has not reached Final Completion by this date, then Settling Defendant shall either (i) pay to the Trustees the sum of \$50,000 as compensation for the additional delay in restoration of Natural Resources, or (ii) perform additional restoration work agreed upon in writing by Settling Defendant and the Trustees. For each subsequent year beyond four years after the Effective Date of this Decree in which Settling Defendant has not reached Final Completion, and the Trustees have not taken over restoration work by requiring payments in accordance with Paragraphs 26 or 28, Settling Defendant shall either (i) pay to the Trustees the sum of \$50,000 as compensation for the additional delay in restoration of Natural Resources, or (ii) perform additional restoration work agreed upon in writing by Settling Defendant and the Trustees. Settling Defendant's obligations under this paragraph are in addition to any other obligations or applicable penalties under this Decree. If a condition constituting default under the terms of the Performance Bond (Appendix F) occurs, Settling Defendant may request, and the Trustees may consider and agree to, adjustments to the construction deadline described in this paragraph and the related deadlines set forth in Appendix C.

12. Within ninety (90) days after Final Completion, Settling Defendant shall submit a written Notice of Final Completion to the Trustees. The Trustees shall review the results of the development of the Project to determine whether the Project has been constructed in accordance with, and as designed to meet the Performance Standards set forth in, Appendix C. Within

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1 ninety (90) days after receiving the Notice of Final Completion, the Trustees shall submit to  
2 Settling Defendant either (a) a written notice identifying specific deficiencies the Trustees  
3 determine must be satisfied for the Project to be completed in accordance with Appendix C  
4 (Notice of Deficiencies); or (b) a written notice of the Trustees' determination that the Project  
5 has been so completed (Notice of Approval of Final Completion). Failure by the Trustees to  
6 provide any notice within the specified time shall be deemed approval. Within one hundred  
7 eighty (180) days of receipt of a Notice of Deficiencies, or as otherwise agreed to in writing by  
8 the Trustees, Settling Defendant shall correct the identified deficiencies and complete the Project  
9 in accordance with Appendix C, and submit to the Trustees an amended Notice of Final  
10 Completion for review and response in accordance with this paragraph. Any delay in completing  
11 construction of the Project as a result of the operation of this paragraph shall not in and of itself  
12 constitute grounds for relief from the requirement to pay compensation under Paragraph 11 of  
13 this Section or stipulated penalties under Section XII (Stipulated Penalties) for compliance  
14 delays.

15 **B. Initial Maintenance and Monitoring Requirements**

16 13. Settling Defendant shall develop and submit to the Trustees for review and  
17 approval an Initial Maintenance and Monitoring Plan, by the deadline set forth in Appendix C  
18 (Sections 9.3 and 10.1), to maintain and monitor the vegetation and habitat of the Project to meet  
19 the Performance Standards set forth in Appendix C for a period of ten (10) years from Final  
20 Completion, including any needed Contingency Measures or Adaptive Management Plans as  
21 directed at the sole and unreviewable discretion of the Trustees. Upon completion of the ten-

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1 year period, Settling Defendant shall provide written Notice of Completion of Initial  
2 Maintenance and Monitoring Obligations to the Trustees in accordance with Section XIX  
3 (Notices and Submissions). Within forty-five (45) days after receiving the Notice of Completion  
4 of Initial Maintenance and Monitoring Obligations, the Trustees shall submit to Settling  
5 Defendant either (a) a written notice identifying specific deficiencies the Trustees determine  
6 must be satisfied for the Initial Maintenance and Monitoring obligations to be completed in  
7 accordance with Appendix C (Notice of Deficiencies); or (b) a written notice of the Trustees'  
8 determination that the Initial Maintenance and Monitoring obligations are completed (Approval  
9 of Completion of Initial Maintenance and Monitoring Obligations). Failure by the Trustees to  
10 provide any notice within the specified time shall be deemed approval. In the event the Trustees  
11 identify, in a Notice of Deficiencies, specific deficiencies with Settling Defendant's compliance  
12 with its obligations, Settling Defendant shall correct the identified deficiencies and complete the  
13 Project in accordance with Appendix C. Within one hundred eighty (180) days of Settling  
14 Defendant's receipt of a Notice of Deficiencies from the Trustees, or as otherwise agreed to in  
15 writing by the Trustees, Settling Defendant shall complete all corrective actions and submit to  
16 the Trustees an amended Notice of Completion of Initial Maintenance and Monitoring  
17 Obligations for review and response in accordance with this paragraph.

18 **C. Long-Term Maintenance and Monitoring Requirements**

19 14. Settling Defendant shall develop and submit to the Trustees for review and  
20 approval a Long-Term Maintenance and Monitoring Plan, by the deadline set forth in Appendix  
21 C (Sections 9.3 and 10.1), for maintaining vegetation and other habitat attributes, for controlling

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1 invasive vegetation and debris removal, and for undertaking corrective actions for any  
2 perturbation that affects the ecological integrity of the Project, as set forth more fully in  
3 Appendix C (Section 8). For purposes of this Decree, Settling Defendant's responsibility for  
4 active maintenance and corrective action of the Project (Long-Term Maintenance and  
5 Monitoring) shall extend twenty (20) years from the Notice of Completion of Initial Maintenance  
6 and Monitoring Obligations, or sooner if the Trustees agree that a "force majeure" event makes  
7 corrective action or further maintenance impossible. Perturbations include events with a  
8 foreseeable probability of occurrence (such as, for example, flood events up to a 100 year flood  
9 event) but do not include "force majeure" events.

10       15. Settling Defendant shall be responsible for continued maintenance and corrective  
11 actions for the Project in accordance with Paragraph 14, regardless of ownership of property  
12 within the Project Site. Settling Defendant is solely responsible for securing the cooperation of  
13 any property owners, including Wildlands, in order to successfully complete and maintain the  
14 Project in accordance with Appendix C. Any failure by Settling Defendant to successfully  
15 complete or maintain the Project in accordance with Appendix C resulting from disputes with  
16 any property owners, including but not limited to, Wildlands, shall not constitute a "force  
17 majeure" event.

18       16. If Settling Defendant transfers ownership of any property within the Project Site  
19 prior to the expiration of Settling Defendant's obligations in Paragraph 14, such transfer shall not  
20 affect or lessen Settling Defendant's obligations under that paragraph, or any other provision of  
21 this Decree, and as a condition of any such transfer, the entity to which any property is

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1 transferred shall be required to provide Settling Defendant with all access necessary to fulfill  
2 Settling Defendant's responsibilities under Paragraph 14. Within sixty (60) days of any proposed  
3 transfer of property within the Project Site, Settling Defendant shall provide the Trustees with  
4 written notice of the proposed transfer, identifying the entity that will own the property,  
5 certifying that Settling Defendant provided a copy of this Decree to such entity and providing a  
6 copy of the proposed access agreement for review and approval by the Trustees.

7 **D. Stewardship Requirements**

8 17. The Parties' intention is that the ecological functions provided by the Project be  
9 maintained in perpetuity. In order to ensure permanent preservation of the Project Site, and  
10 ensure all ecological functions provided by the Project be maintained in perpetuity, Settling  
11 Defendant shall grant and record a conservation easement for the Project Site, including for its  
12 property, and obtain necessary agreements to grant and record such a conservation easement for  
13 property owned by Wildlands. The conservation easements shall be in the form set forth in  
14 Appendix D, and shall be executed within thirty (30) days of the Effective Date of this Decree.  
15 Settling Defendant shall take all other appropriate actions necessary to ensure that the Project  
16 Site will not be used in a manner inconsistent with the requirements of this Decree.

17 18. Prior to the completion of Long-Term Maintenance and Monitoring, Settling  
18 Defendant shall make arrangements for Stewardship of the Project, consistent with the  
19 requirements of the Conservation Bank Agreement.

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**E. General Project Requirements**

19. Settling Defendant shall not take any action that is inconsistent with this Decree and that would adversely affect the Project, including those prohibited actions set forth in the Conservation Easement (Appendix D) and the Conservation Bank Agreement.

20. Settling Defendant shall undertake all activities required to address cultural resource issues associated with the Project, including, as applicable, consultation with tribes and the Washington State Department of Archaeology and Historic Preservation, conducting a background and project review by an archaeologist who meets the Department of Interior's professional qualification standards at 36 C.F.R. Part 61, conducting cultural resource surveys or monitoring activities, and meeting the requirements in Sections 5.1.5 and 6.3 of Appendix C.

**F. Performance Guarantees**

21. Purpose of Performance Guarantees. Settling Defendant shall provide certain Performance Guarantees, described in this Section VI.F, in order to ensure that there are sufficient funds to properly construct the Project and conduct Maintenance and Monitoring, notwithstanding any noncompliance with the terms of this Consent Decree by Settling Defendant or Wildlands. The Performance Guarantees are intended to provide sufficient funds to Settling Defendant to complete, maintain, and monitor the Project in the event of noncompliance by Wildlands; and to provide sufficient funds to the Trustees to complete, maintain, and monitor the Project in the event of noncompliance by both Settling Defendant and Wildlands, or noncompliance by Wildlands that Settling Defendant fails to remedy.

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1           22.    Project Escrow Account. In accordance with the Project Escrow Agreement  
2 attached as Appendix G, Settling Defendant shall establish a Project Escrow Account in  
3 accordance with the timeframes set forth in Appendix G. The Project Escrow Agreement may  
4 not be modified or terminated without the express written approval of the Trustees.

5                   a.       The Project Escrow Account shall have two subaccounts:

6                           i.     A subaccount to hold the transferred funds described in Paragraph I above  
7 (funds paid by settlors in the Cashout Consent Decree) and Paragraph 32 below (funds paid on  
8 behalf of the Settling Federal Agency), and any proceeds received by Settling Defendant from  
9 the Performance Bond described in Paragraph 24 below (the "Transfer Subaccount"); and

10                          ii.    A subaccount to hold other funds provided by Settling Defendant to  
11 Wildlands to complete construction of the Project (the "Direct Subaccount"), to be funded as  
12 described in Appendix E.

13                   b.       Settling Defendant shall only use the funds in the Project Escrow Account  
14 for the Project, and any remaining funds shall only be released after the Trustees provide a  
15 Notice of Approval of Final Completion as described in Paragraph 12.

16                   c.       At least fifteen (15) days before making any payment from the Project  
17 Escrow Account, Settling Defendant shall provide notice and an accounting to the Trustees of  
18 the proposed expenditures from the Project Escrow Account, including a copy of the invoice(s)  
19 to be paid and statement of the work performed.

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1                   d.       In the event that the Trustees issue a Notice of Exercise of Performance  
2   Guarantee pursuant to Paragraph 26.d, the Trustees shall be entitled to all funds in the Transfer  
3   Subaccount necessary to complete construction of the Project, as determined by the Trustees.

4           23.    Maintenance and Monitoring Escrow Account. In accordance with the  
5   Maintenance and Monitoring Escrow Agreement attached as Appendix G, Settling Defendant  
6   shall establish a Maintenance and Monitoring Escrow Account in the amount of \$625,836 within  
7   sixty (60) days of the Effective Date of this Decree. The Maintenance and Monitoring Escrow  
8   Agreement may not be modified or terminated without the express written approval of the  
9   Trustees. Settling Defendant shall only use the funds in the Maintenance and Monitoring  
10   Escrow Account for Maintenance and Monitoring of the Project. Any funds remaining in the  
11   Maintenance and Monitoring Escrow Account at the conclusion of the Maintenance and  
12   Monitoring period shall be applied towards Stewardship of the Project.

13          24.    Performance Bond. In order to ensure completion of construction of the Project,  
14   Settling Defendant shall secure a surety bond (Performance Bond) in the initial amount of  
15   \$5,076,748.21 and in the form attached as Appendix F, guaranteeing payment and/or  
16   construction of the Project by Wildlands for the benefit of the Port and Trustees. Such  
17   Performance Bond shall be issued by a surety company among those listed as acceptable sureties  
18   on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury, and  
19   approved by the Trustees.

20               a.       Settling Defendant shall obtain the Performance Bond within ninety (90)  
21   days of the Effective Date of this Decree, and submit an executed copy to the Trustees. Settling

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1 Defendant shall ensure that the Performance Bond is maintained as legally binding and fully  
2 effective.

3 b. Calling the Performance Bond.

4 i. Settling Defendant or the Trustees may call the Performance Bond at any  
5 time after a Notice of Project Abandonment or Default is provided to the surety pursuant to  
6 Paragraph 26.a, provided that the Parties comply with the timing provisions of Paragraph 26.b  
7 and 26.c.

8 ii. If Settling Defendant calls the Performance Bond and the surety elects to  
9 complete the Project, Settling Defendant shall provide surety's written notice of such election to  
10 the Trustees with ten (10) days of receipt, and shall meet and confer with Trustees regularly  
11 regarding the progress of remaining Project construction under surety. Any failure by the surety  
12 to properly complete construction of the Project shall not relieve Settling Defendant of its  
13 obligations pursuant to this Decree.

14 iii. If the Settling Defendant calls the Performance Bond and the surety elects  
15 to tender to Settling Defendant sufficient funds to complete the Project, Settling Defendant shall  
16 deposit such funds into the Transfer Subaccount and use such funds to complete the Project.  
17 Any failure by the surety to tender sufficient funds to Settling Defendant shall not relieve  
18 Settling Defendant of its obligations pursuant to this Decree. At least fifteen (15) days before  
19 making any payment from the Performance Bond, Settling Defendant shall provide notice and an  
20 accounting to the Trustees of the proposed expenditures from the Performance Bond, including a  
21 copy of the invoice(s) to be paid and statement of the work performed.

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1                   c.       Settling Defendant may submit to the Trustees, on any anniversary of the  
2   Effective Date of this Decree or at any other time agreed to by the Parties, a request to reduce the  
3   amount, or change the form or terms, of the Performance Bond. Any such request must include  
4   an estimate of the cost of the remaining construction work, an explanation of the bases for the  
5   cost calculation, and a description of the proposed changes. The Trustees will notify Settling  
6   Defendant in writing of their decision to approve or disapprove a requested change pursuant to  
7   this subparagraph. Settling Defendant may reduce the amount of or change the form or terms of  
8   the Performance Bond only in accordance with: (a) the Trustees' approval; or (b) if there is a  
9   dispute, the agreement or final judicial decision resolving such dispute under Section XI (Dispute  
10   Resolution). Within thirty (30) days after receipt of the Trustees' approval of, or the agreement  
11   or decision resolving a dispute relating to, the requested modifications pursuant to this  
12   subparagraph, Settling Defendant shall submit to the Trustees documentation of the reduced,  
13   revised, or alternative Performance Bond.

14                   d.       If the issuer of the Performance Bond notifies Settling Defendant that it  
15   intends to resign and/or cancel the Performance Bond, and the Settling Defendant fails to provide  
16   an alternative financial assurance mechanism in an amount and form that is reasonably  
17   acceptable to the Plaintiffs, Settling Defendant must pay in full the funds guaranteed under the  
18   Performance Bond to the Transfer Subaccount at least thirty (30) days prior to the cancellation  
19   date.

20                   25.   Order of Performance Guarantees. The Parties intend that the funds in the  
21   Transfer Subaccount described in Paragraph 22 above will be the first source of funding to

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1 complete construction of the Project. Therefore, the funds secured by the Performance Bond  
2 described in Paragraph 24 above will be available to Settling Defendant only after the balance in  
3 the Transfer Subaccount has been exhausted. Funds in the Maintenance and Monitoring Escrow  
4 Account described in Paragraph 23 above will be available to the Parties only after Final  
5 Completion of the Project.

6 26. Exercise of Performance Guarantees by the Trustees. The Performance  
7 Guarantees described above provide funding to complete construction, or Maintenance and  
8 Monitoring, in the event a Default occurs or in the event of a Project Abandonment. The Parties  
9 have agreed that, before the Trustees may exercise the Performance Guarantees described above,  
10 Settling Defendant shall have a limited opportunity to pursue dispute processes with the Trustees  
11 and/or with Wildlands regarding any such Project Abandonment or Default. This paragraph  
12 describes the processes and timelines for identifying and notifying the Parties of identified  
13 Project Abandonment or Default; for disputes about identified Project Abandonment or Default;  
14 and for exercise of the Performance Guarantees by the Trustees.

15 a. Identification of Project Abandonment or Default. If Settling Defendant  
16 identifies or learns of Project Abandonment or Default, Settling Defendant shall issue a Notice of  
17 Project Abandonment or Default to the Trustees within fifteen (15) days, and explain what steps  
18 are being taken to address the Project Abandonment or Default. If the Trustees independently  
19 determine that Project Abandonment or Default has occurred, the Trustees will issue a Notice of  
20 Project Abandonment or Default to Settling Defendant, specifying the deficiencies and grounds  
21 upon which such notice was issued. Settling Defendant shall have fifteen (15) days from

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1 issuance or receipt (as applicable) of such notice to remedy, to the Trustees' satisfaction, the  
2 issues set forth in the Notice of Project Abandonment or Default.

3           b. Dispute Processes for Project Abandonment or Default. If Settling  
4 Defendant has not remedied to the Trustees' satisfaction the issues set forth in the Notice of  
5 Project Abandonment or Default within fifteen (15) days, the Trustees will issue a Notice of  
6 Intent to Exercise Performance Guarantee ("Notice of Intent"). Within fifteen (15) days from  
7 receipt of such Notice of Intent, Settling Defendant shall either (i) remedy the identified issues,  
8 (ii) invoke dispute resolution procedures with the Trustees pursuant to Section XI (Dispute  
9 Resolution); or (iii) invoke the procedures for notice, cure and arbitration ("Cure and Arbitration  
10 Process") with Wildlands pursuant to the terms of the agreement between Settling Defendants  
11 and Wildlands.

12           i. If, within fifteen (15) days of receipt of a Notice of Intent, Settling  
13 Defendant does not either remedy the identified issues, invoke dispute resolution procedures  
14 with the Trustees pursuant to Section XI (Dispute Resolution), or invoke the Cure and  
15 Arbitration Process with Wildlands, then the Trustees may exercise the Performance Guarantees  
16 as the Trustees deem necessary to complete or maintain the Project.

17           ii. If Settling Defendant timely initiates dispute resolution procedures with  
18 the Trustees pursuant to Section XI (Dispute Resolution), or timely initiates the Cure and  
19 Arbitration Process with Wildlands, the Trustees will not exercise the Performance Guarantees  
20 until at least one hundred eighty (180) days have elapsed from issuance of the Notice of Intent  
21 (the "Abeyance Period"), and will exercise the Performance Guarantees only in the event that the

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1 issues described in the Notice of Project Abandonment or Default have not been remedied to the  
2 Trustees' satisfaction during the Abeyance Period.

3           iii. If, after the Abeyance Period described above has elapsed, the Project  
4 Abandonment or Default has not been corrected, the Trustees may exercise the Performance  
5 Guarantees as the Trustees deem necessary to complete or maintain the Project, but only in the  
6 order described in Paragraph 25. If a dispute process between Settling Defendant and Wildlands  
7 is ongoing at that time, Settling Defendant may request, and the Trustees may, but shall not be  
8 required to, agree to an additional extension of time before exercising the Performance  
9 Guarantees. If a dispute process between Settling Defendant and the Trustees is ongoing at that  
10 time, the Trustees may in their sole discretion exercise the Performance Guarantees until the  
11 earlier of (1) the date that Settling Defendant remedies, to the Trustees' satisfaction, the  
12 circumstances giving rise to the dispute, or (2) the date that a final decision is rendered by the  
13 court in favor of Settling Defendant. Following either event, the Trustees shall cease obligating  
14 any further funds pursuant to this Section VI.F but shall not be required to repay any funds  
15 already obligated or spent by the Trustees.

16           c. Exception for Project Takeovers. If, as a result of Project Abandonment  
17 or Default, the Trustees exercise the Performance Guarantees pursuant to the provisions of  
18 subparagraphs 26.a and 26.b and actually take over construction of the Project by drawing on the  
19 funds in the Transfer Subaccount and/or calling the Performance Bond, then the Trustees shall  
20 not be required to follow the process described in subparagraphs 26.a and 26.b prior to  
21 exercising any remaining Performance Guarantees.

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1                   d.     Exercise of Performance Guarantees. The Trustees shall exercise the  
2     Performance Guarantees by sending a Notice of Exercise of Performance Guarantee to the  
3     Escrow Agent or Surety, as applicable, as further described in Appendices E, F, and G. Any  
4     funds obtained by the Trustees' exercise of the Performance Guarantees shall be, as directed by  
5     the Trustees: (i) paid to the Trustees in order to facilitate the completion of the work by the  
6     Trustees or by another person; or (ii) deposited into an interest-bearing account, established at a  
7     duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the  
8     completion of the work by another person.

9           27.     Release, Cancellation, or Discontinuation of Performance Guarantees. Settling  
10    Defendant shall not release, cancel, or discontinue any Performance Guarantee required under  
11    this Section except as provided pursuant to this paragraph and as set forth in Appendices E, F  
12    and G. Settling Defendant may release, cancel, or discontinue any Performance Guarantee  
13    provided under this Section only: (a) for the Performance Guarantees required by Paragraphs 22  
14    and 24, if the Trustees issue a Notice of Approval of Final Completion under Paragraph 12; (b)  
15    in accordance with the Trustees' written notice of approval of such release, cancellation, or  
16    discontinuation; or (c) if there is a dispute between the Trustees and Settling Defendant regarding  
17    the release, cancellation or discontinuance of any Performance Guarantee, in accordance with  
18    any agreement or final judicial decision resolving such dispute under Section XI (Dispute  
19    Resolution) and permitting such release, cancellation, or discontinuation.

20           28.     Shortfall Payments. If the Trustees take over construction of the Project, and the  
21    funds available in the Transfer Subaccount and any funds received directly by the Trustees from

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1 the Performance Bond are insufficient to complete construction of the Project, Settling  
2 Defendant shall, in addition to the funds in the Transfer Subaccount, pay to the Trustees all  
3 remaining costs necessary to complete construction of the Project, as determined by the Trustees,  
4 up to a total amount of \$4,634,287.47 ("shortfall payments"). Whenever a shortfall payment is  
5 required to fund remaining work, the Trustees will provide Settling Defendant with an estimate  
6 of the cost of remaining work along with a demand for payment of the estimated costs. Payment  
7 shall be made within thirty (30) days of the demand for such payment(s) from the Trustees.  
8 Within 180 days of completion of any work funded by shortfall payments, the Trustees will  
9 provide Settling Defendant with documentation of the costs incurred. Shortfall payments shall  
10 be paid in accordance with Paragraph 26.d. For the purpose of Section XII (Stipulated  
11 Penalties), Settling Defendant's full payment of the costs necessary to complete restoration work,  
12 as determined by the Trustees, in accordance with this subparagraph shall constitute compliance  
13 by the Settling Defendant with the deadline set forth in Paragraph 11.

14 **G. Restriction on Sale of Ecological or Other Conservation Credits**

15 29. Settling Defendant may use the Project for purposes of a bank to sell or transfer to  
16 other parties ecological or conservation credits to potentially resolve liabilities under federal and  
17 state environmental laws; however, to resolve its liability pursuant to this Decree, Settling  
18 Defendant shall, upon Final Completion of the Project, purchase 469.39 NRD DSAYs in the  
19 Project, equivalent to 34.79 acres of the Project Site, which acreage shall not be used as the basis  
20 for credits transferred or offered for sale to other parties. Except as set forth in this Section VI.G  
21 (Restriction on Sale of Ecological or Other Conservation Credits), Settling Defendant's

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1 establishment and operation of any such bank or transfer or sale of credits to other parties is not  
2 subject to this Decree.

3 30. Settling Defendant shall take the following steps to ensure that Settling Defendant  
4 does not transfer or sell credits based upon the excluded portion of the Project Site identified in  
5 Paragraph 29:

6 a. Within 30 days of the sale of any credits (whether NRD,  
7 CBA/conservation, or wetlands credits), Settling Defendant shall submit credit sales  
8 documentation to Trustees. Where applicable, this documentation shall be the same  
9 documentation Settling Defendant submits to NOAA under the Conservation Bank Agreement.

10 b. Settling Defendant shall maintain a register of any credit sales and  
11 transfers (whether NRD, CBA/conservation, or wetlands credits) that reflects the acreage  
12 associated with each sale or transfer, and shall provide an updated version of the register to the  
13 Trustees with each annual Maintenance and Monitoring Report, or upon the request of the  
14 Trustees.

15 **H. Selection of Contractors**

16 31. Settling Defendant has selected, and the Trustees have approved, Wildlands as its  
17 contractor to design, construct, monitor and maintain the Restoration Project. The selection of  
18 any other contractor hereafter retained by Settling Defendant to perform any of the work required  
19 under this Decree shall be subject to Trustee approval. Settling Defendant shall notify the  
20 Trustees in writing of the name, title and qualifications of any contractor Settling Defendant  
21 proposes to retain, and of any proposed changes in the selection of a contractor. The Trustees

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1 will notify Settling Defendant in writing of the approval or disapproval of a proposed contractor.  
2 The Trustees' assent to the proposed selection or change of a contractor may be presumed unless  
3 the Trustees notify Settling Defendant in writing of their objection to the proposed selection or  
4 change within thirty (30) days of Settling Defendant' written selection notice.

5 **VII. PAYMENT OF NATURAL RESOURCE DAMAGES BY SETTling FEDERAL**  
6 **AGENCY AND USE BY SETTling DEFENDANT**

7 32. As soon as reasonably practicable after the Effective Date, the United States, on  
8 behalf of the Settling Federal Agency, will pay to the Transfer Subaccount described in  
9 Paragraph 22.a.i above a total of \$789,840 for Natural Resource Damages. Payment shall be  
10 made by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with  
11 instructions provided by Settling Defendant.

12 33. Interest. In the event that the payment required by Paragraph 32 is not made  
13 within 120 days after the Effective Date, the United States, on behalf of the Settling Federal  
14 Agency, shall pay interest on the unpaid balance, at the rate specified for interest on investments  
15 of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded  
16 annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate  
17 of interest is the rate in effect at the time the interest accrues. The rate of interest is subject to  
18 change on October 1 of each year. Such interest shall commence on the 121st day after the  
19 Effective Date and accrue through the date of the payment.

20 34. Settling Defendant will notify the Trustees and the U.S. Department of Justice, in  
21 accordance with Section XIX (Notices), within 3 days of receiving the payment described in

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Paragraph 32. Written notice to each Trustee by electronic mail, using the Trustee's e-mail address(es) listed in Section XIX (Notices), satisfies the notice requirement of this paragraph. Settling Defendant shall only use the payment described in Paragraph 32 for the Project. Within 30 days of receiving the payment described in Paragraph 32, Settling Defendant shall purchase 80 NRD DSAYs in the Project, equivalent to 5.93 acres of the Project Site, which acreage shall not be used as the basis for credits transferred or offered for sale to other parties.

## VIII. PAYMENTS OF ASSESSMENT COSTS

### A. Payments by Settling Defendant for Assessment Costs

35. Within thirty (30) days of the Effective Date of this Decree, Settling Defendant shall pay the amounts for past assessment costs as described below:

a. Payments for Past Assessment Costs Incurred by the United States.

i. Within 30 days after the Effective Date, Settling Defendant shall pay \$468,157.19 to the United States for unpaid assessment costs incurred by the United States through September 30, 2018. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account, in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the Western District of Washington after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

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1 John Carter  
2 Chief Financial Officer  
3 (425) 388-0616  
4 johnc@portofeverett.com  
5 1205 Craftsman Way  
6 Suite 200  
7 Everett, Washington 98201

8  
9 Bob Marion  
10 Controller  
11 (425) 388-0616  
12 robertm@portofeverett.com  
13 1205 Craftsman Way  
14 Suite 200  
15 Everett, Washington 98201

16 on behalf of Settling Defendant. Settling Defendant may change the individuals to receive  
17 payment instructions on its behalf by providing written notice of such change to the United  
18 States in accordance with Section XIX (Notices).

19 ii. Of the total amount to be paid by Settling Defendant pursuant to  
20 Subparagraph 35.a.i:

21 1. \$291,019.73 shall be deposited in the DOI Natural Resource  
22 Damage Assessment and Restoration Fund ("NRDAR Fund"), to be applied toward natural  
23 resource damage assessment costs incurred by DOI.

24 2. \$177,137.46 shall be deposited in the NOAA Damage Assessment  
25 Remediation and Restoration Fund ("DARRF"), to be applied toward natural resource damage  
26 assessment costs incurred by NOAA.

27 b. Payment for Past Assessment Costs Incurred by the State. Within 30 days  
28 after the Effective Date, Settling Defendant shall pay \$75,000.00 to the State of Washington for

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unpaid assessment costs incurred by the State through September 30, 2018. Payment shall be made by check or electronic fund transfer to the Washington State Department of Ecology, referencing account 1T491. If payment is made by mail, Settling Defendant shall send checks to:

Cashiering Unit  
Department of Ecology  
P.O. Box 47611  
Olympia, WA 98504-7611

c. Payment of Past Assessment Costs Incurred by the Suquamish

Tribe. Within 30 days after the Effective Date, Settling Defendant shall pay \$69,486.83 to the Suquamish Tribe for unpaid assessment costs incurred by the Tribe through September 30, 2018. Payment shall be made by check to the Suquamish Tribe bearing the notation "Port Gardner Bay NRDA." Settling Defendant shall send checks to:

Finance Director  
The Suquamish Tribe  
Office of Tribal Attorney  
P.O. Box 498  
18690 Suquamish Way  
Suquamish, WA 98392

d. Payment of Past Assessment Costs Incurred by the Tulalip Tribes. Within

30 days after the Effective Date, Settling Defendant shall pay \$90,851.69 to the Tulalip Tribes for unpaid assessment costs incurred by the Tribes through September 30, 2018. Payment shall be made by check to the Tulalip Tribes bearing the notation "Port Gardner Bay NRDA." Settling Defendant shall send checks to:

Mr. Timothy A. Brewer

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Office of the Reservation Attorney  
The Tulalip Tribes  
6406 Marine Drive  
Tulalip, WA 98271

36. Payment of Interim Costs. The Trustees shall provide Settling Defendant with a bill requiring payment of costs incurred by the Trustees after September 30, 2018, through the Effective Date of the Consent Decree, up to \$36,500. Within 30 days of receiving the bill requiring payment of costs from the Trustees, Settling Defendant shall pay the costs in accordance with the procedures set forth in Paragraphs 35.a-d and 46.

37. Prepayment of Future Costs. Within 30 days after the Effective Date, Settling Defendant shall pay \$23,000 for assessment, restoration planning, and restoration implementation costs to be incurred by the Trustees after the Effective Date of this Decree. Payment shall be made to the U.S. Department of Justice in accordance with Paragraph 35.a.i and 46. These funds shall then be deposited in a Port Gardner Bay NRD Account within the DOI NRDAR Fund on behalf of the Trustees. All funds deposited in the Port Gardner Bay NRD Account shall, in accordance with law, be managed by DOI for use by the Natural Resource Trustees in connection with restoration of Natural Resources in the Port Gardner Bay Area. DOI shall not make any charge against the Port Gardner Bay NRD Account for any management services provided. DOI shall hold all funds in the Port Gardner Bay NRD Account subject to the provisions of this Decree. The Trustees commit to the expenditure of the funds set forth in this Section VIII for the design, implementation, permitting (as necessary), monitoring, and oversight

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1 of restoration projects and for the costs of complying with the requirements of the law to conduct  
2 the restoration planning and implementation process.

3 **B. Payments by Settling Federal Agency for Assessment Costs**

4 38. Payment to DOI. As soon as reasonably practicable after the Effective Date, the  
5 United States, on behalf of the Settling Federal Agency, shall pay \$58,220.98 to DOI's NRDAR  
6 Fund, in reimbursement of assessment costs incurred by DOI through September 30, 2018.

7 39. Payment to NOAA. As soon as reasonably practicable after the Effective Date,  
8 the United States, on behalf of the Settling Federal Agency, shall pay \$31,602.69 to NOAA's  
9 DARRF, in reimbursement of assessment costs incurred by NOAA through September 30, 2018.

10 40. Payment to the State. As soon as reasonably practicable after the Effective Date,  
11 the United States, on behalf of the Settling Federal Agency, shall pay to the State \$20,659.50, for  
12 unpaid assessment costs incurred by the State through September 30, 2018, by Automated  
13 Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by  
14 the State.

15 41. Payment to the Suquamish Tribe. As soon as reasonably practicable after the  
16 Effective Date, the United States, on behalf of the Settling Federal Agency, shall pay to the  
17 Suquamish Tribe \$10,356.00, for unpaid assessment costs incurred by the Suquamish Tribe  
18 through September 30, 2018, by Automated Clearing House (ACH) Electronic Funds Transfer in  
19 accordance with instructions provided by the Suquamish Tribe.

20 42. Payment to the Tulalip Tribes. As soon as reasonably practicable after the  
21 Effective Date, the United States, on behalf of the Settling Federal Agency, shall pay to the

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1 Tulalip Tribes \$15,091.94, for unpaid assessment costs incurred by the Tulalip Tribes through  
2 September 30, 2018, by Automated Clearing House (ACH) Electronic Funds Transfer in  
3 accordance with instructions provided by the Tulalip Tribes.

4 43. Interest. In the event that any payment required by Paragraphs 38-42 is not made  
5 within 120 days after the Effective Date, the United States, on behalf of the Settling Federal  
6 Agency, shall pay interest on the unpaid balance, at the rate specified in Paragraph 33, with such  
7 interest commencing on the 121st day after the Effective Date and accruing through the date of  
8 the payment.

9 44. Payment of Interim Costs. The Trustees shall provide the Settling Federal  
10 Agency with a bill requiring payment of assessment costs incurred by the Trustees after  
11 September 30, 2018, through the Effective Date of the Consent Decree, up to \$74,000. As soon  
12 as reasonably practicable after receiving the bill requiring payment of costs from the Trustees,  
13 the United States, on behalf of the Settling Federal Agency, shall pay the costs in accordance  
14 with the procedures set forth in Paragraphs 38-42. In the event that any payment required by this  
15 paragraph is not made within 120 days after receiving the bill from the Trustees, the United  
16 States, on behalf of the Settling Federal Agency, shall pay interest on the unpaid balance, at the  
17 rate specified in Paragraph 33, with such interest commencing on the 121st day after receipt of  
18 the bills and accruing through the date of the payment.

19 45. The Parties to this Decree recognize and acknowledge that the payment  
20 obligations of the Settling Federal Agency under this Decree can only be paid from appropriated  
21 funds legally available for such purpose. Nothing in this Decree shall be interpreted or construed

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1 as a commitment or requirement that the Settling Federal Agency obligate or pay funds in  
2 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of  
3 law.

4 **C. Notice of Payments**

5 46. At the time of each payment pursuant to Paragraphs 35-37, 38-42, and 44, the  
6 Party making the payment will send notice to the recipient of the payment that payment has been  
7 made. Written notice to a Party by electronic mail, using the Party's e-mail address(es) listed in  
8 Section XIX (Notices), satisfies the notice requirement of this paragraph. Such notice will  
9 reference Port Gardner Bay NRDA, DOJ case number 90-11-3-10859/1 and the civil action  
10 number.

11 **IX. INDEMNIFICATION AND INSURANCE**

12 47. Settling Defendant's Indemnification of the Plaintiffs.

13 a. The Plaintiffs do not assume any liability by entering into this Consent  
14 Decree. Settling Defendant shall indemnify, save, and hold harmless each of the Plaintiffs  
15 and/or their officials, agents, employees, contractors, subcontractors, or representatives for or  
16 from any and all claims or causes of action arising from, or on account of, negligent or other  
17 wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents,  
18 contractors, subcontractors, and any persons acting on Settling Defendant's behalf or under its  
19 control, including Wildlands, in carrying out activities pursuant to this Decree. Further, Settling  
20 Defendant agrees to pay the Plaintiffs all costs they incur including, but not limited to, attorneys'  
21 fees and other expenses of litigation and settlement arising from, or on account of, claims made

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1 against the Plaintiffs based on negligent or other wrongful acts or omissions of Settling  
2 Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons  
3 acting on its behalf or under its control, in carrying out activities pursuant to this Decree. Except  
4 as specifically identified in Appendix F, none of the Plaintiffs shall be held out as a party to any  
5 contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to  
6 this Decree. Neither Settling Defendant nor any contractor or representative of Settling  
7 Defendant shall be considered an agent of any Plaintiff. Settling Defendant shall require any  
8 contractor retained by Settling Defendant who performs work for Settling Defendant in carrying  
9 out activities pursuant to this Decree to affirmatively acknowledge that it is not acting as an  
10 agent of any Plaintiff.

11 b. Plaintiffs shall give Settling Defendant notice of any claim for which one  
12 or more Plaintiffs plans to seek indemnification pursuant to this paragraph, and shall consult with  
13 Settling Defendant prior to settling such claim.

14 48. Settling Defendant covenants not to sue and agrees not to assert any claims or  
15 causes of action against the Plaintiffs for damages or reimbursement or for set-off of any  
16 payments made or to be made to the Plaintiffs, arising from or on account of any contract,  
17 agreement, or arrangement between Settling Defendant and any person for performance of  
18 activities pursuant to this Decree, including, but not limited to, claims on account of construction  
19 delays. In addition, Settling Defendant shall indemnify, save and hold harmless the Plaintiffs  
20 with respect to any and all claims for damages or reimbursement arising from or on account of  
21 any contract, agreement, or arrangement between Settling Defendant and any person for

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1 performance of activities pursuant to this Decree, including, but not limited to, claims on account  
2 of construction delays.

3 49. Insurance. No later than fifteen (15) days before commencing any work involved  
4 in implementing this Decree, Settling Defendant shall secure and maintain comprehensive  
5 general liability and automobile liability insurance with limits of five million dollars, combined  
6 single limit. The Trustees shall be named additional insureds on any such policies with respect  
7 to all liability arising out of the activities performed by or on behalf of Settling Defendant  
8 pursuant to this Decree. In addition, for the duration of this Decree, Settling Defendant shall  
9 satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and  
10 regulations regarding the provision of worker's compensation insurance for all persons  
11 performing any work involved in implementing this Decree. No later than fifteen (15) days  
12 before commencing any work involved in implementing this Decree, Settling Defendant shall  
13 provide to the Trustees certificates of such insurance and copies of such insurance policies.  
14 Settling Defendant shall resubmit such certificates and copies of policies each year on the  
15 anniversary of the Effective Date. If Settling Defendant demonstrates by evidence satisfactory to  
16 the Trustees that any contractor or subcontractor maintains insurance equivalent to that described  
17 above, or insurance covering the same risks but in a lesser amount, then, with respect to that  
18 contractor or subcontractor, Settling Defendant need provide only that portion of the insurance  
19 described above that is not maintained by the contractor or subcontractor.

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**X. FORCE MAJEURE**

50. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendant or of any entity controlled by Settling Defendant, or of the Settling Defendant’s contractors and subcontractors, that delays or prevents the performance of any obligation under this Decree despite Settling Defendant’s best efforts to fulfill the obligation. The requirement that Settling Defendant exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. The requirement that Settling Defendant 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. “Force majeure” does not include financial inability to complete any obligation under this Decree.

51. If any event occurs or has occurred that may delay the performance of any obligation under this Decree for which Settling Defendant intends or may intend to assert a claim of force majeure, Settling Defendant shall notify, in writing or by electronic transmission, the Plaintiffs within seven (7) days of when Settling Defendant first knew that the event might cause a delay. Within 14 days thereafter, Settling Defendant shall provide in writing to the Plaintiffs an 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 of implementation of

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1 any measures to be taken to prevent or mitigate the delay or the effect of the delay; and the  
2 Settling Defendant's rationale for attributing such delay to a force majeure. Settling Defendant  
3 shall include with any notice all available documentation supporting its claim that the delay was  
4 attributable to a force majeure. Settling Defendant shall be deemed to know of any circumstance  
5 of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's  
6 contractors or subcontractors knew or should have known. Failure to comply with the above  
7 requirements regarding an event shall preclude Settling Defendant from asserting any claim of  
8 force majeure regarding that event, provided, however, that if the Plaintiffs, despite the late or  
9 incomplete notice, are able to assess to their satisfaction whether the event is a force majeure  
10 under this Section and whether Settling Defendant has exercised its best efforts under this  
11 Section, the Plaintiffs may, in their unreviewable discretion, excuse in writing Settling  
12 Defendant's failure to submit timely or complete notices under this paragraph.

13         52. If the Plaintiffs agree that the delay or anticipated delay is attributable to a force  
14 majeure, the time for performance of the obligations under this Consent Decree that are affected  
15 by the force majeure will be extended by the Plaintiffs for such time as is necessary to complete  
16 these obligations. An extension of the time for performance of the obligations affected by the  
17 force majeure shall not, of itself, extend the time for performance of any other obligation. If the  
18 Plaintiffs do not agree that the delay or anticipated delay has been or will be caused by a force  
19 majeure, the Plaintiffs will notify Settling Defendant in writing of their decision. If the Plaintiffs  
20 agree that the delay is attributable to a force majeure, the Plaintiffs will notify Settling Defendant

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1 in writing of the length of the extension, if any, for performance of the obligations affected by  
2 the force majeure.

3 53. If Settling Defendant elects to invoke the dispute resolution procedures set forth  
4 in Section XI (Dispute Resolution) regarding the Plaintiffs' decision, it shall do so no later than  
5 15 days after receipt of Plaintiffs' notice. In any such proceeding, Settling Defendant shall have  
6 the burden of demonstrating by a preponderance of the evidence that the delay or anticipated  
7 delay has been or will be caused by a force majeure, that the duration of the delay or the  
8 extension sought was or will be warranted under the circumstances, that best efforts were  
9 exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied  
10 with the requirements of Paragraphs 50 and 51. If Settling Defendant carries this burden, the  
11 delay at issue shall be deemed not to be a violation by Settling Defendant of the affected  
12 obligation of this Decree identified to Plaintiffs and the Court.

#### 13 XI. DISPUTE RESOLUTION

14 54. Unless otherwise expressly provided for in this Consent Decree, the dispute  
15 resolution procedures of this Section shall be the exclusive mechanism to resolve disputes  
16 regarding this Decree. However, the procedures set forth in this Section shall not apply to  
17 actions by the United States to enforce obligations of the Settling Defendant that have not been  
18 disputed in accordance with this Section.

19 55. Informal Dispute Resolution. A dispute shall be considered to have arisen when  
20 the Plaintiffs send the Settling Defendant a written Notice of Dispute, or the Settling Defendant  
21 sends the Plaintiffs a written Notice of Dispute. Any dispute regarding this Decree shall in the

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1 first instance be the subject of informal negotiations between the Plaintiffs and Settling  
2 Defendant. The period for informal negotiations shall not exceed twenty-one (21) days from the  
3 date the Notice of Dispute is sent, unless it is modified by written agreement of the parties to the  
4 dispute.

5           56.   Formal Dispute Resolution.

6           a.       In the event that the parties cannot resolve a dispute by informal  
7 negotiations under the preceding paragraph, then the position advanced by the Plaintiffs shall be  
8 considered binding unless, within twenty-one (21) days after the conclusion of the informal  
9 negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this  
10 Section by serving on the Plaintiffs a written Statement of Position on the matter in dispute,  
11 including, but not limited to, any factual data, analysis, or opinion supporting that position and  
12 any supporting documentation relied upon by Settling Defendant.

13           b.       Within twenty-one (21) days after receipt of Settling Defendant's  
14 Statement of Position, the Plaintiffs will serve on the Settling Defendant their Statement of  
15 Position, including, but not limited to, any factual data, analysis, or opinion supporting that  
16 position and any supporting documentation relied upon by the Plaintiffs. Within twenty-one (21)  
17 days after receipt of Plaintiffs' Statement of Position, Settling Defendant may submit a Reply.

18           c.       An administrative record of the dispute shall be maintained by the  
19 Plaintiffs and shall contain all statements of position, including supporting documentation,  
20 submitted pursuant to this Section. Where appropriate, the Plaintiffs may allow submission of  
21 supplemental statements of position by the parties to the dispute.

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1                   d.       The Plaintiffs will issue a final decision resolving the dispute based on the  
2 administrative record described in subparagraph (c) above. This decision shall be binding upon  
3 the Settling Defendant, subject only to the right to seek judicial review pursuant to  
4 subparagraphs (e) and (f) below.

5                   e.       Any final decision made by the Plaintiffs pursuant to subparagraph (d)  
6 shall be reviewable by this Court, provided that a motion for judicial review of the decision is  
7 filed by the Settling Defendant with the Court and served on all Parties within ten (10) days after  
8 receipt of the Plaintiffs' decision. The motion shall include a description of the matter in dispute,  
9 the efforts made by the parties to resolve it, the final decision of the Plaintiffs, the relief  
10 requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly  
11 implementation of this Decree. The Plaintiffs may file a response to Settling Defendant's  
12 motion.

13                  f.       In proceedings on any dispute governed by this paragraph, the Settling  
14 Defendant shall have the burden of demonstrating that the decision of the Plaintiffs is arbitrary  
15 and capricious or otherwise not in accordance with law. Judicial review of the final decision of  
16 the Plaintiffs shall be on the administrative record compiled pursuant to subparagraph (c).

17                  g.       The invocation of formal dispute resolution procedures under this Section  
18 does not extend, postpone, or affect in any way any obligation of Settling Defendant under this  
19 Decree that is not directly in dispute, unless the Plaintiffs agree otherwise or as determined by  
20 the Court. Stipulated penalties with respect to the disputed matter shall continue to accrue, but  
21 payment shall be stayed pending resolution of the dispute, as provided in Paragraph 64.

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1 Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of  
2 noncompliance with any applicable provision of this Decree. In the event that Settling  
3 Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid  
4 as provided in Section XII (Stipulated Penalties).

5 **XII. STIPULATED PENALTIES**

6 57. Settling Defendant shall be liable to the Plaintiffs for stipulated penalties in the  
7 amounts set forth in Paragraphs 58 and 59 for failure to comply with the requirements of this  
8 Consent Decree specified below, unless excused under Section X (Force Majeure).

9 58. Late Payments. Settling Defendant shall pay a stipulated penalty of \$1,500 per  
10 day that each payment pursuant to Section VIII (Payments of Assessment Costs) is not made by  
11 the required due date.

12 59. Failure to Meet Deadlines or Satisfy Requirements of the Decree. In the event  
13 that Settling Defendant fails to meet a deadline or satisfy other requirements in this Decree  
14 (subject to any modifications agreed to under Section XXII) set forth in Paragraphs 11, 22-24, 28  
15 and 29 and in Section 10 of Appendix C, and any delay is not excused through operation of the  
16 provisions of Section X (Force Majeure), then Settling Defendant shall pay stipulated penalties  
17 per violation per day for any noncompliance as follows:

18	<u>Period of Noncompliance</u>	<u>Penalty per Violation per Day</u>
19	1 <sup>st</sup> through 14 <sup>th</sup> day	\$500
20	15 <sup>th</sup> through 30 <sup>th</sup> day	\$750
21	31 <sup>st</sup> day and beyond	\$1,000

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1           Nothing in this Decree prevents the simultaneous accrual of separate penalties for separate  
2 violations of this Decree.

3           60.     In the event that the Trustees assume performance of a portion or all of the  
4 Restoration Project pursuant to Section VI, Defendant shall be liable for a stipulated penalty in  
5 the amount of \$100,000. Stipulated penalties under this paragraph are in addition to the  
6 remedies available under Paragraph 26 (Exercise of Performance Guarantees).

7           61.     All penalties shall begin to accrue on the day after the complete performance is  
8 due or the day a violation occurs, and shall continue to accrue through the final day of the  
9 correction of the noncompliance or completion of activity, or until the Trustees send a Notice of  
10 Exercise of Performance Guarantee under Paragraph 26.d. However, stipulated penalties shall  
11 not accrue: (a) with respect to a final decision by the Plaintiffs under Paragraph 56.d of Section  
12 XI (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that  
13 the Settling Defendant's reply to the Plaintiffs' Statement of Position is received until the date  
14 that the Plaintiffs issue a final decision regarding such dispute; or (b) with respect to judicial  
15 review by this Court of any dispute under Section XI (Dispute Resolution), during the period, if  
16 any, beginning on the 31<sup>st</sup> day after the Court's receipt of the final submission regarding the  
17 dispute until the date that the Court issues a final decision regarding such dispute. Nothing in  
18 this Decree shall prevent the simultaneous accrual of separate penalties for separate violations of  
19 this Decree.

20           62.     Following the determination by the Plaintiffs, individually or jointly, that Settling  
21 Defendant has failed to comply with a requirement of this Decree, the Plaintiffs may give

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1 Settling Defendant written notification of the same and describe the noncompliance. The  
2 Trustees may send Settling Defendant a written demand for payment of the penalties. However,  
3 penalties shall accrue as provided in the preceding paragraph regardless of whether the Trustees  
4 have notified Settling Defendant of a violation.

5         63. All penalties accruing under this Section shall be due and payable to the Plaintiffs  
6 within 30 days after Settling Defendant's receipt from the Plaintiff(s) of a demand for payment  
7 of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under  
8 Section XI (Dispute Resolution) within the 30-day period. All payments for stipulated penalties  
9 to the United States under this paragraph will be deposited by EFT to the United States Treasury  
10 in accordance with Paragraph 35.a.i. Payments for stipulated penalties to the State of  
11 Washington, the Suquamish Tribe or the Tulalip Tribes shall be paid in accordance with the  
12 procedures set forth in Paragraph 35.b-35.d. At the time of each payment, Settling Defendant  
13 will send notice that payment has been made to the Trustees and the U.S. Department of Justice  
14 in accordance with Section XIX (Notices). This notice will reference Port Gardner Bay Area  
15 NRD, DOJ Case Number 90-11-3-10859/1, and the civil action number.

16         64. Penalties shall continue to accrue as provided in Paragraph 61 during any dispute  
17 resolution period, but need not be paid until the following:

18             a. If the dispute is resolved by agreement of the parties or by a decision of  
19 the Plaintiffs that is not appealed to this Court, accrued penalties determined to be owed shall be  
20 paid to the Plaintiffs within 15 days after the agreement or the receipt of the Plaintiffs' decision  
21 or order;

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1                   b.     If the dispute is appealed to this Court and the Plaintiffs prevail in whole  
2 or in part, the Settling Defendant shall pay all accrued penalties determined by the Court to be  
3 owed to the Plaintiffs within 60 days after receipt of the Court's decision or order, except as  
4 provided in subparagraph (c) below;

5                   c.     If the District Court's decision is appealed by any Party, Settling  
6 Defendant shall pay all accrued penalties determined by the District Court to be owed to the  
7 Plaintiffs into an interest-bearing escrow account, established at a duly chartered bank or trust  
8 company that is insured by the FDIC, within 60 days after receipt of the Court's decision or  
9 order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days.  
10 Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the  
11 balance of the account to the Plaintiffs or to Settling Defendant to the extent that it prevails.

12               65.     If Settling Defendant fails to pay stipulated penalties when due, Settling  
13 Defendant shall pay interest, at the rate specified in 28 U.S.C. § 1961 as of the Lodging Date, on  
14 the unpaid stipulated penalties as follows: (a) if Settling Defendant has timely invoked dispute  
15 resolution such that the obligation to pay stipulated penalties has been stayed pending the  
16 outcome of dispute resolution, interest shall accrue from the date stipulated penalties are due  
17 pursuant to Paragraph 61 until the date of payment; and (b) if Settling Defendant fails to timely  
18 invoke dispute resolution, interest shall accrue from the date of demand under Paragraph 63 until  
19 the date of payment. If Settling Defendant fails to pay stipulated penalties and interest due,  
20 Plaintiffs may institute proceedings to collect the penalties and interest.

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1           66.     The payment of penalties and interest, if any, shall not alter in any way Settling  
2 Defendant's obligations to make any other payments as required by this Decree or to perform  
3 any other requirement of this Decree.

4           67.     Nothing in this Decree shall be construed as prohibiting, altering, or in any way  
5 limiting the ability of the Plaintiffs to seek any other remedies or sanctions available by virtue of  
6 Settling Defendant's violation of this Decree.

7           68.     Notwithstanding any other provision of this Section, the Plaintiffs may, in their  
8 unreviewable discretion, waive any portion of compensation under Paragraph 11 or stipulated  
9 penalties that accrued pursuant to this Decree.

10                           **XIII. COVENANTS BY THE PLAINTIFFS**

11           69.     Covenant for Settling Defendant by Plaintiffs. Except as provided by Section  
12 XIV (Reservations of Rights by Plaintiffs), the Plaintiffs covenant not to sue or to take  
13 administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42  
14 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311(f) of the CWA, 33 U.S.C. § 1321(f);  
15 Chapter 90.48 RCW; Section 1002(a) of OPA, 33 U.S.C. § 2702(a); or federal statutory or state  
16 statutory or common law, to recover Natural Resource Damages. This covenant not to sue shall  
17 take effect upon receipt of Settling Defendant's complete payment of costs pursuant to Section  
18 VIII.A (Payments by Settling Defendant for Assessment Costs). This covenant not to sue shall  
19 continue in effect conditioned upon the satisfactory performance by Settling Defendant of its  
20 obligations under this Consent Decree. This covenant not to sue extends only to the Settling  
21 Defendant and does not extend to any other person.

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1           70.     Covenants for Settling Federal Agency.

2                   a.     Except as provided by Section XIV (Reservations of Rights by Plaintiffs),  
3     the Federal Trustees covenant not to take administrative action against the Settling Federal  
4     Agency pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Section 311(f) of the  
5     CWA, 33 U.S.C. § 1321(f); Section 1002(a) of OPA, 33 U.S.C. § 2702(a); or federal statutory or  
6     state statutory or common law, to recover Natural Resource Damages. This covenant shall take  
7     effect upon receipt of the payments required by Section VII and Paragraphs 38, 39, and 44 of  
8     Section VIII.B. The Federal Trustees' covenant is conditioned upon the satisfactory  
9     performance by the Settling Federal Agency of its obligations under this Decree. The Federal  
10    Trustees' covenant extends only to the Settling Federal Agency and does not extend to any other  
11    person.

12                   b.     Except as provided by Section XIV (Reservations of Rights by Plaintiffs),  
13    the State and the Tribes covenant not to sue or to take administrative action against the United  
14    States, including the Settling Federal Agency, pursuant to Section 107(a) of CERCLA, 42 U.S.C.  
15    § 9607(a); Chapter 70.105D RCW; Section 311(f) of the CWA, 33 U.S.C. § 1321(f); Chapter  
16    90.48 RCW; Section 1002(a) of OPA, 33 U.S.C. § 2702(a); or federal statutory or state statutory  
17    or common law, to recover Natural Resource Damages. This covenant shall take effect upon  
18    receipt of the payments required by Section VII and Paragraphs 40-42 and 44 of Section VIII.B.  
19    The State and Tribes' covenant is conditioned upon the satisfactory performance by the Settling  
20    Federal Agency of its obligations under this Decree. The State and Tribes' covenant extends  
21    only to the United States and does not extend to any other person.

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**XIV. RESERVATIONS OF RIGHTS BY PLAINTIFFS**

71. General Reservations of Rights. The Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendant, and the Federal Trustees, the State, and the Tribes reserve, and this Consent Decree is without prejudice to, all rights against the Settling Federal Agency, with respect to all matters not expressly included within the Plaintiffs' covenants in Section XIII. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve all rights against the Settling Defendant, and the Federal Trustees, the State, and the Tribes reserve all rights against the Settling Federal Agency, with respect to:

- a. liability for failure by Settling Defendant or Settling Federal Agency to meet a requirement of this Decree;
- b. criminal liability;
- c. liability for any other costs, including without limitation, costs of response incurred or to be incurred by the United States, the State, or the Tribes under any federal or State statute or tribal law that are not within the definition of Natural Resource Damages;
- d. liability for damages to Natural Resources (including assessment costs) as defined in 42 U.S.C. §§ 9601(6) and (16) that are not expressly included within the Plaintiffs' covenants in Section XIII;
- e. liability for damages to Natural Resources (including assessment costs) as defined in 42 U.S.C. §§ 9601(6) and (16) within the Port Gardner Bay Area resulting from Settling Defendant's or Settling Federal Agency's transportation, treatment, storage, or disposal,

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1 or arrangement for transportation, treatment, storage, or disposal of hazardous substances after  
2 the Lodging Date of this Decree;

3 f. liability for injunctive relief or administrative order enforcement under  
4 any federal or State statute; and

5 g. liability under Section 107(a)(4)(D) of CERCLA, 42 U.S.C. §  
6 9607(a)(4)(D), for costs of any health assessment or health effects study carried out under 42  
7 U.S.C. § 9604(i) in or regarding the Port Gardner Bay Area.

8 72. Special Reservations Regarding Natural Resource Damages. Notwithstanding  
9 any other provision of this Consent Decree, the Plaintiffs reserve the right to institute  
10 proceedings against Settling Defendant in this action or in a new action seeking recovery of  
11 Natural Resource Damages, based on (1) conditions, factors or information with respect to the  
12 Port Gardner Bay Area, not known to the Trustees at the Lodging Date, that result in releases of  
13 hazardous substances that contribute to injury to, destruction of, or loss of Natural Resources, or  
14 (2) information received after the Lodging Date which indicates that there is injury to,  
15 destruction of, or loss of Natural Resources of a type or future persistence that was unknown, or  
16 of a magnitude significantly greater than was known to the Trustees at the Lodging Date.

17 73. Special Reservations by the Federal Trustees Regarding Natural Resource  
18 Damages. Notwithstanding any other provision of this Consent Decree, the Federal Trustees  
19 reserve the right to take administrative action against the Settling Federal Agency for the  
20 recovery of Natural Resource Damages, based on (1) conditions, factors or information with  
21 respect to the Port Gardner Bay Area, not known to the Trustees at the Lodging Date, that result

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1 in releases of hazardous substances that contribute to injury to, destruction of, or loss of Natural  
2 Resources, or (2) information received after the Lodging Date which indicates that there is injury  
3 to, destruction of, or loss of Natural Resources of a type or future persistence that was unknown,  
4 or of a magnitude significantly greater than was known to the Trustees at the Lodging Date.

5 74. Special Reservations by the State and Tribes Regarding Natural Resource  
6 Damages. Notwithstanding any other provision of this Consent Decree, the State and the Tribes  
7 reserve the right to institute proceedings against the Settling Federal Agency in this action or a  
8 new action for the recovery of Natural Resource Damages, based on (1) conditions, factors or  
9 information with respect to the Port Gardner Bay Area, not known to the Trustees at the Lodging  
10 Date, that result in releases of hazardous substances that contribute to injury to, destruction of, or  
11 loss of Natural Resources, or (2) information received after the Lodging Date which indicates  
12 that there is injury to, destruction of, or loss of Natural Resources of a type or future persistence  
13 that was unknown, or of a magnitude significantly greater than was known to the Trustees at the  
14 Lodging Date.

15 **XV. COVENANTS BY SETTLING DEFENDANT AND SETTLING FEDERAL**  
16 **AGENCY**

17 75. Covenants by Settling Defendant. Settling Defendant covenants not to sue and  
18 agrees not to assert any claims or causes of action against the United States (including the  
19 Settling Federal Agency), the State, the Suquamish Tribe, or the Tulalip Tribes, or their  
20 contractors or employees, with respect to Natural Resource Damages or this Consent Decree,  
21 including, but not limited to:

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- 1                   a.       any claims arising out of activities related to the Restoration Project,  
2 including, without limitation, claims based on the Trustees' approval of the Restoration Project,  
3 oversight and monitoring of the Restoration Project, and/or approval of plans for such activities;  
4                   b.       any direct or indirect claim for reimbursement of any payment for Natural  
5 Resource Damages from the Hazardous Substance Superfund based on CERCLA Sections 107,  
6 111, 112, 113 (42 U.S.C. §§ 9607, 9611, 9612, 9613), or any other provision of law;  
7                   c.       any claim against the Plaintiffs pursuant to Sections 107 and 113 of  
8 CERCLA, 42 U.S.C. §§ 9607 and 9613, or Section 311 of the CWA, 33 U.S.C. § 1321, relating  
9 to Natural Resource Damages; or  
10                  d.       any federal statutory or state statutory or common law claim relating to  
11 Natural Resource Damages.

12 These covenants not to sue shall not apply in the event that the Plaintiffs take administrative  
13 action, issue administrative findings and orders, or bring a cause of action against Settling  
14 Defendant for Natural Resource Damages pursuant to the reservations set forth in Paragraphs 71  
15 and 72, above, but only to the same extent and for the same matters, transactions, or occurrences  
16 as are raised in the claims asserted by the Plaintiffs pursuant to such reservations.

17       76.    Covenant by the Settling Federal Agency.

- 18                   a.       The Settling Federal Agency hereby agrees not to assert against Federal  
19 Trustees any direct or indirect claim for reimbursement of any payment for Natural Resource  
20 Damages based on Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 311 of  
21 the CWA, 33 U.S.C. § 1321, or federal statutory or state statutory or common law, including

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1 payments made under Sections VII and VIII.B These covenants shall not apply in the event that  
2 Federal Trustees take administrative action against the Settling Federal Agency pursuant to the  
3 reservations set forth in Section XIV, above, but only to the same extent and for the same  
4 matters, transactions, or occurrences as are raised in the claims asserted by the Federal Trustees  
5 pursuant to such reservations.

6           b. The Settling Federal Agency hereby covenants not to sue the State or the  
7 Tribes under Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 311(f)(4) and  
8 (5) of the CWA, 33 U.S.C. § 1321(f)(4) and (5), or federal statutory or state statutory or common  
9 law, with respect to Natural Resource Damages, including payments made under Sections VII  
10 and VIII.B. These covenants shall not apply in the event the State and/or the Tribes bring a  
11 claim and/or administrative action against the Settling Federal Agency pursuant to the  
12 reservations set forth in Section XIV, above, but only to the same extent and for the same  
13 matters, transactions, or occurrences as are raised in the claims asserted by the State and/or the  
14 Tribes pursuant to such reservations.

15           **XVI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

16           77. Nothing in this Consent Decree shall be construed to create any rights in, or grant  
17 any cause of action to, any person not a Party to this Decree. Except as provided in Section XV,  
18 each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to  
19 Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action  
20 that each Party may have with respect to any matter, transaction, or occurrence relating in any  
21 way to the Port Gardner Bay Area against any person not a Party hereto. Nothing in this Decree

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1 diminishes the right of the Plaintiffs, pursuant to Section 113(f)(2) and (3) of CERCLA, 42  
2 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional relief (including  
3 response action, response costs, and natural resource damages, including costs of damage  
4 assessment) and to enter into settlements that give rise to contribution protection pursuant to  
5 Section 113(f)(2) of CERCLA.

6       78. The Parties agree, and by entering this Decree this Court finds, that this Decree  
7 constitutes a judicially-approved settlement pursuant to which Settling Defendant and the United  
8 States on behalf of the Settling Federal Agency have, as of the Effective Date, resolved liability  
9 to the Plaintiffs within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2),  
10 and are entitled, as of the Effective Date, to protection from contribution actions or claims as  
11 provided by Section 113(f)(2) of CERCLA and RCW 70.105D.040(4)(d), or as may be otherwise  
12 provided by law, for matters addressed in this Consent Decree. For these purposes, the “matters  
13 addressed” in this Consent Decree are Natural Resource Damages, as defined herein; provided,  
14 however, that if the Plaintiffs exercise rights against Settling Defendant or if the Federal  
15 Trustees, the State, and/or the Tribes assert rights against the Settling Federal Agency under the  
16 reservations in Section XIV, other than Paragraphs 71.a (claims for failure to meet a requirement  
17 of this Decree) and 71.b (criminal liability), the contribution protection afforded by this Decree  
18 will no longer include those matters that are within the scope of the exercised reservation.

19       79. The Parties further agree, and by entering this Decree this Court finds, that the  
20 complaint filed by the Plaintiffs in this action is a civil action within the meaning of Section  
21 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Decree constitutes a judicially-

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1 approved settlement pursuant to which the Settling Defendant and the Settling Federal Agency  
2 have, as of the Effective Date, resolved liability to the Plaintiffs for Natural Resource Damages  
3 within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

4 80. Settling Defendant shall, with respect to any suit or claim brought by it for  
5 contribution for Natural Resource Damages, notify the Plaintiffs in writing no later than 60 days  
6 prior to the initiation of such suit or claim. Settling Defendant shall also notify in writing the  
7 Plaintiffs within 10 days of any settlement of its claims (regardless of whether the claim is filed  
8 or unfilled) for contribution for Natural Resource Damages.

9 81. Settling Defendant shall, with respect to any suit or claim brought against it for  
10 matters related to this Decree, notify in writing the Plaintiffs within 10 days after service of the  
11 complaint on Settling Defendant. In addition, Settling Defendant shall notify the Plaintiffs  
12 within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days  
13 after receipt of any order from a court setting a case for trial.

14 82. Waiver of Claim-Splitting Defenses.

15 a. In any subsequent administrative or judicial proceeding initiated by the  
16 Plaintiffs for injunctive relief, recovery of response costs or Natural Resource Damages, or other  
17 appropriate relief relating to the Port Gardner Bay Area, Settling Defendant shall not assert, and  
18 may not maintain, any defense or claim based upon the principles of waiver, res judicata,  
19 collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention  
20 that the claims raised by the Plaintiffs in the subsequent proceedings were or should have been

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1 brought in the instant case; provided, however, that nothing in this paragraph affects the  
2 enforceability of the covenants not to sue set forth in Section XIII (Covenants by the Plaintiffs).

3           b. In any subsequent administrative or judicial proceeding initiated by the  
4 State and/or the Tribes for injunctive relief, or Natural Resource Damages or other relief related  
5 to the Port Gardner Bay Area, the Settling Federal Agency shall not assert, and may not  
6 maintain, any defense or claim based upon the principles of waiver, res judicata, collateral  
7 estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the  
8 claims raised by the State and/or the Tribes in the subsequent proceedings were or should have  
9 been brought in the instant case; provided, however, that nothing in this paragraph affects the  
10 enforceability of the covenants not to sue set forth in Section XIII (Covenants by the Plaintiffs).

11                   **XVII. ACCESS TO PROJECT SITE AND INFORMATION**

12           83. The Plaintiffs and their representatives, including attorneys, contractors, and  
13 consultants, shall have the right of entry to the Project Site and any property under the control of  
14 the Port to which entry is required for oversight or implementation of this Decree, at all  
15 reasonable times, to:

- 16           a. monitor the progress of activities required under this Decree;  
17           b. assess compliance with this Decree;  
18           c. verify any data or information submitted to the Plaintiffs in accordance  
19 with the terms of this Decree;

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1                   d.     inspect and copy records, operation logs, contracts, or other documents  
2 maintained or generated by Settling Defendant or its contractor to perform work undertaken  
3 pursuant to this Decree;

4                   e.     obtain samples (including conducting fish sampling as needed to include  
5 data in salmon recovery efforts) and, upon request, splits of any samples taken by Settling  
6 Defendant or its representatives, contractors, or consultants, including Wildlands;

7                   f.     obtain documentary evidence, including photographs, video recordings,  
8 sound recordings, and similar data. Plaintiffs may direct that Settling Defendant use a camera,  
9 sound recording device, or other type of equipment to record the work done on the Restoration  
10 Project or to record injury to Natural Resources and provide copies of any such recordings to the  
11 Trustees;

12                  g.     conduct such tests and investigations as deemed necessary to monitor  
13 compliance with this Consent Decree; and

14                  h.     undertake any maintenance action or additional work as the Trustees  
15 determine appropriate. Such maintenance actions or additional work shall only be taken with the  
16 approval of Settling Defendant, which approval may be withheld only upon a showing that the  
17 proposed action would be inconsistent with the purposes of the Restoration Project as described  
18 in Appendix C, with other provisions of the Decree or other applicable law, or would impose  
19 costs or additional liability upon Settling Defendant.

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**XVIII. RETENTION OF RECORDS**

84. Until ten years after Settling Defendant's receipt of the Trustees' notification pursuant to Paragraph 13 (Approval of Completion of Initial Maintenance and Monitoring Obligations), Settling Defendant shall preserve and retain all non-identical copies of all records, reports, documents, and other information, including records, reports, documents, and other information in electronic form (hereinafter referred to as "Records") now in its possession or control. Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any Records now in their possession or control or that come into their possession or control that relate in any manner to the performance of the Restoration Project, provided, however, that Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Restoration Project and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

85. The United States acknowledges that the Settling Federal Agency is subject to all applicable federal record retention laws, regulations, and policies.

86. At the conclusion of this record retention period, Settling Defendant shall notify the Plaintiffs at least 90 days prior to the destruction of any such Records, and, upon request by the Plaintiffs, Settling Defendant shall deliver any such records to the Trustees. Settling Defendant may assert that all or part of a Record requested by the Trustees is privileged or protected under federal law. If Settling Defendant asserts a claim of privilege or protection, it

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1 shall provide the following information regarding such Record: its title; its date; the name, title,  
2 affiliation (e.g., company or firm), and address of the author, of each addressee, and of each  
3 recipient; a description of the Record's contents; and the privilege or protection asserted. If a  
4 claim of privilege or protection applies only to a portion of a Record, Settling Defendant shall  
5 provide the Record to the Trustees in redacted form to mask the privileged or protected portion  
6 only. Settling Defendant shall retain all Records that it claims to be privileged or protected until  
7 the Trustees have had a reasonable opportunity to dispute the privilege or protection claim and  
8 any such dispute has been resolved in the Settling Defendant's favor. Settling Defendant may  
9 make no claim of privilege or protection regarding: (1) any data regarding the Port Gardner Bay  
10 Area, including, but not limited to, all sampling, analytical, monitoring, scientific, chemical, or  
11 engineering data, or the portion of any other Record that relates to the Restoration Project or  
12 conditions at or around Port Gardner Bay Area; or (2) any Record or portion of any Record that  
13 Settling Defendant is required to create or generate pursuant to this Consent Decree.

14 87. Settling Defendant certifies that, to the best of its knowledge and belief, after  
15 thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any  
16 Records (other than identical copies) relating to its potential liability regarding the Port Gardner  
17 Bay Area since notification of potential liability by any Trustee.

18 **XIX. NOTICES AND SUBMISSIONS**

19 88. All approvals, consents, deliverables, modifications, notices, notifications,  
20 proposals, reports, and requests specified in this Consent Decree must be in writing unless  
21 otherwise specified. Whenever, under this Decree, notice is required to be given, or a report or

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1 other document is required to be sent, by one Party to another, it must be directed to the  
2 person(s) specified below at the address(es) specified below. Any Party may change the person  
3 and/or address applicable to it by providing notice of such change to all Parties. All notices  
4 under this Section are effective upon receipt, unless otherwise specified. Except as otherwise  
5 provided, written notice to a Party by regular mail in accordance with this Section satisfies any  
6 notice requirement of the Decree regarding such Party.

7 **As to the United States and as to the U.S. Department of Justice:**

8  
9 EES Case Management Unit  
10 U.S. Department of Justice  
11 Environment and Natural Resources Division  
12 P.O. Box 7611  
13 Washington, D.C. 20044-7611  
14 eesdcopy.enrd@usdoj.gov  
15 Re: DJ # 90-11-3-10859/1

16  
17 Kent E. Hanson  
18 U.S. Department of Justice  
19 Environment and Natural Resources Division  
20 Environmental Defense Section  
21 P.O. Box 7611  
22 Washington, D.C. 20044-7611  
23 kent.hanson@usdoj.gov  
24 Re: DJ # 90-11-8-20035

25  
26 **As to the United States Department of Interior:**

27  
28 Alexandra James  
29 Office of the Regional Solicitor  
30 U.S. Department of the Interior  
31 805 SW Broadway, Suite 600  
32 Portland, OR 97205  
33 alexandra.james@sol.doi.gov

34  
35 Jeff Krausmann

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1 Fish and Wildlife Biologist/NRDA Specialist  
2 U.S. Fish and Wildlife Service  
3 Washington Fish and Wildlife Office  
4 510 Desmond Drive, SE, Suite 102  
5 Lacey, Washington 98503-1263  
6 jeff\_krausmann@fws.gov  
7

8 **As to the National Oceanic and Atmospheric Administration:**  
9

10 Christopher J. Plaisted  
11 National Oceanic and Atmospheric Administration  
12 Office of General Counsel, Natural Resources Section  
13 U.S. Department of Commerce  
14 501 W. Ocean Blvd, Suite 4470  
15 Long Beach, CA 90802  
16 christopher.plaisted@noaa.gov  
17

18 Jason Lehto  
19 National Oceanic and Atmospheric Administration  
20 NMFS Restoration Center  
21 U.S. Department of Commerce  
22 7600 Sand Point Way NE  
23 Seattle, WA 98115  
24 jason.a.lehto@noaa.gov  
25

26 **As to the State of Washington:**  
27

28 Donna Podger  
29 Toxics Cleanup Program  
30 State of Washington  
31 P.O. Box 47600  
32 Olympia, WA 98504-7600  
33 dpod461@ecy.wa.gov  
34

35 John A. Level  
36 Attorney General's Office  
37 P.O. Box 40117  
38 Olympia, WA 98504-0117  
39 johnl3@atg.wa.gov  
40

41 **As to the Suquamish Tribe:**

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1  
2 Richard Brooks  
3 Environmental Program Manager  
4 P.O. Box 498  
5 18690 Suquamish Way  
6 Suquamish, WA 98392  
7 rbrooks@suquamish.nsn.us

8  
9 Melody Allen  
10 Office of Tribal Attorney  
11 P.O. Box 498  
12 18690 Suquamish Way  
13 Suquamish, WA 98392  
14 mallen@suquamish.nsn.us

15  
16 **As to the Tulalip Tribes:**

17  
18 Kurt Nelson  
19 Environmental Manager  
20 Tulalip Tribes  
21 6406 Marine Drive  
22 Tulalip, WA 98271  
23 knelson@tulaliptribes-nsn.gov

24  
25 Timothy Brewer  
26 Tulalip Tribes Office of the Reservation Attorney  
27 6406 Marine Drive  
28 Tulalip, WA 98271  
29 tbrewer@tulaliptribes-nsn.gov

30  
31 **As to the Port of Everett:**

32  
33 Erik Gerking  
34 Director of Environmental Programs  
35 Port of Everett  
36 1205 Craftsman Way, Suite 200  
37 Everett, WA 98201  
38 erikg@portofeverett.com

39  
40 Paul Brachvogel  
41 Chief of Legal Affairs

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1 Port of Everett  
2 1205 Craftsman Way, Suite 200  
3 Everett, WA 98201  
4 paulb@portofeverett.com  
5

6 **XX. RETENTION OF JURISDICTION**

7 89. This Court retains jurisdiction over both the subject matter of this Consent Decree  
8 and Settling Defendant for the duration of the performance of the terms and provisions of this  
9 Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time  
10 for such further order, direction, and relief as may be necessary or appropriate for the  
11 construction or modification of this Decree, or to effectuate or enforce compliance with its terms,  
12 or to resolve disputes in accordance with Section XI (Dispute Resolution).

13 **XXI. APPENDICES**

14 90. The following appendices are attached to and incorporated into this Consent  
15 Decree:

16 "Appendix A" is the map depicting the Port Gardner Bay Area.

17 "Appendix B" is the list of properties within the Port Gardner Bay Area currently and  
18 formerly owned and/or operated by Settling Defendant or owned and/or operated by the  
19 Settling Federal Agency that are included within the definition of Natural Resource  
20 Damages for purposes of this Decree.

21 "Appendix C" is the Statement of the Work for the Blue Heron Slough Restoration  
22 Project.

23 "Appendix D" is the Conservation Easement for the Project Site.

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1 “Appendix E” is the Project Escrow Agreement.

2 “Appendix F” is the Performance Bond for Construction of the Project.

3 “Appendix G” is the Maintenance and Monitoring Escrow Agreement.

4 **XXII. MODIFICATION**

5 91. Material modifications to this Consent Decree, including the Appendices, shall be  
6 in writing, signed by the Parties, and shall be effective upon approval by the Court. Non-  
7 material modifications to this Decree, including the Appendices, shall be in writing and shall be  
8 effective when signed by duly authorized representatives of the Parties. Nothing in this Consent  
9 Decree shall be deemed to alter the Court’s power to enforce, supervise, or approve  
10 modifications to this Decree.

11 92. If Settling Defendant experiences significant adverse changes to its financial  
12 circumstances or unanticipated delays in obtaining expected funding for the Restoration Project,  
13 Settling Defendant may request, and the Trustees may consider and agree to, a modification of  
14 the schedules and deadlines set forth in this Decree, including those set forth in Appendix C, as  
15 necessary.

16 **XXIII. ENFORCEMENT**

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

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1                   **XXIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

2           94.     This Consent Decree shall be lodged with the Court for at least 30 days for public  
3 notice and comment. The Plaintiffs reserve the right to withdraw or withhold their consent if  
4 comments regarding the Decree disclose facts or considerations that indicate that the Decree is  
5 inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Decree  
6 without further notice.

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

10                   **XXV. SIGNATORIES/SERVICE**

11           96.     The Assistant Attorney General for the Environment and Natural Resources  
12 Division of the Department of Justice and each undersigned representative of the State of  
13 Washington, the Suquamish Tribe, the Tulalip Tribes, and Settling Defendant certifies that he or  
14 she is fully authorized to enter into the terms and conditions of this Decree and to execute and  
15 legally bind such Party that he or she represents to this document.

16           97.     Settling Defendant agrees not to oppose entry of this Consent Decree by this  
17 Court or to challenge any provisions of this Decree unless any Plaintiff has notified Settling  
18 Defendant in writing that it no longer supports entry of the Decree.

19           98.     Settling Defendant shall identify on the attached signature page the name,  
20 address, and telephone number of an agent who is authorized to accept service of process by mail  
21 on behalf of that Party with respect to all matters arising under or relating to this Decree.

CONSENT DECREE

UNITED STATES DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
P.O. Box 7611, Washington, D.C. 20044-7611  
202-514-5270

1 Settling Defendant agrees to accept service in that manner and to waive the formal service  
2 requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local  
3 rules of this Court, including, but not limited to, service of summons. Settling Defendant needs  
4 not file answers to the complaint unless or until the Court expressly declines to enter this Decree.

5 **XXVI. FINAL JUDGMENT**

6 99. This Consent Decree and its appendices constitute the final, complete, and  
7 exclusive agreement and understanding among the Parties regarding the settlement embodied in  
8 this Decree. The Parties acknowledge that there are no representations, agreements, or  
9 understandings relating to the settlement other than those expressly contained in this Decree.

10 100. Upon entry of this Consent Decree by the Court, this Decree shall constitute a  
11 final judgment between and among the Parties. The Court finds that there is no just reason for  
12 delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

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14 SO ORDERED THIS <sup>th</sup> 24 DAY OF July, 2019.

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United States District Judge

CONSENT DECREE

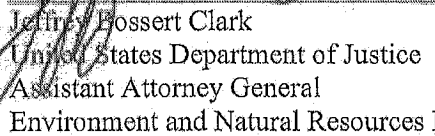
UNITED STATES DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
P.O. Box 7611, Washington, D.C. 20044-7611  
202-514-5270

1 Signature Page for Consent Decree Regarding the Port Gardner Bay Area.  
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4 **FOR THE UNITED STATES OF AMERICA:**  
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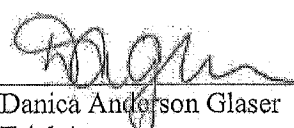
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5/17/19

  
Jeffrey Bossert Clark  
United States Department of Justice  
Assistant Attorney General  
Environment and Natural Resources Division  
Washington, D.C. 20530

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20 Date

6/3/19

  
Danica Anderson Glaser  
Trial Attorney  
United States Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044-7611

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29 Date

\_\_\_\_\_  
Kent E. Hanson  
Senior Attorney  
United States Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044-7611

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1 Signature Page for Consent Decree Regarding the Port Gardner Bay Area.  
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4 **FOR THE UNITED STATES OF AMERICA:**  
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10 Date \_\_\_\_\_

11 Jeffrey Bossert Clark  
12 United States Department of Justice  
13 Assistant Attorney General  
14 Environment and Natural Resources Division  
15 Washington, D.C. 20530  
16  
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18  
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20 Date \_\_\_\_\_

21 Danica Anderson Glaser  
22 Trial Attorney  
23 United States Department of Justice  
24 Environment and Natural Resources Division  
25 Environmental Enforcement Section  
26 P.O. Box 7611, Ben Franklin Station  
27 Washington, D.C. 20044-7611  
28

29 Date 5/20/2019

30   
31 Kent E. Hanson  
32 Senior Attorney  
33 United States Department of Justice  
34 Environment and Natural Resources Division  
35 Environmental Defense Section  
36 P.O. Box 7611  
37 Washington, D.C. 20044-7611  
38  
39

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Environment and Natural Resources Division  
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202-514-5270

1 Signature Page for Consent Decree Regarding the Port Gardner Bay Area.  
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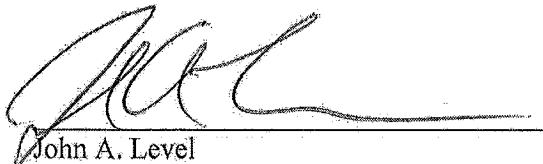
4 **FOR THE STATE OF WASHINGTON:**  
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10 Date 5/22/19  
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12 Maia Bellon  
13 Director  
14 Washington State Department of Ecology

15  
16  
17 Date 5/22/19  
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19 John A. Level  
20 Assistant Attorney General  
21 State of Washington  
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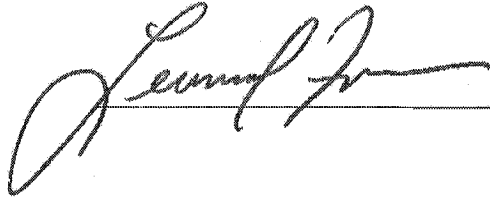
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1 Signature Page for Consent Decree Regarding the Port Gardner Bay Area.  
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4 **FOR THE SUQUAMISH TRIBE:**  
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10 Date 5/14/19  
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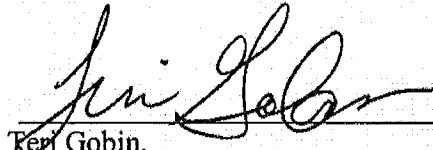
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Environment and Natural Resources Division  
P.O. Box 7611, Washington, D.C. 20044-7611  
202-514-5270

Signature Page for Consent Decree Regarding the Port Gardner Bay Area.

**FOR THE TULALIP TRIBES:**

Date 6/1/19   
Kerl Gobin,  
Chairwoman  
The Tulalip Tribes  
6406 Marine Drive  
Tulalip, WA 98271

Date 6.1.19   
Tim Brewer,  
Reservation Attorney  
Tulalip Tribes Office of the Reservation Attorney  
6406 Marine Drive  
Tulalip, WA 98271

Date 6/1/19   
Saza Osawa,  
Reservation Attorney  
Tulalip Tribes Office of the Reservation Attorney  
6406 Marine Drive  
Tulalip, WA 98271

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Environment and Natural Resources Division  
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202-514-5270



1 Signature Page for Consent Decree Regarding the Port Gardner Bay Area.  
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5 **FOR THE PORT OF EVERETT:**  
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11 Date MAY 14, 2019 Ler Beardsley  
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20 Agent Authorized to Accept Service Name: \_\_\_\_\_  
21 On Behalf of Above-Signed Party: Title: \_\_\_\_\_  
22 Company: \_\_\_\_\_  
23 Address: \_\_\_\_\_  
24 \_\_\_\_\_  
25 Phone: \_\_\_\_\_  
26 Email: \_\_\_\_\_  
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UNITED STATES DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
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