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

UNITED STATES OF AMERICA, ON BEHALF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE UNITED STATES DEPARTMENT OF THE INTERIOR, AND THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; STATE OF WASHINGTON; PUYALLUP TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; Plaintiffs, v. PORT OF TACOMA Defendant	C93-5462 Civil No. COMMENCEMENT BAY NEARSHORE/TIDEFLATS SUPERFUND SITE; SITCUM WATERWAY PROBLEM AREA CONSENT DECREE

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CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA") and the federal Natural Resource Trustees (as defined in paragraph 4), and the other Natural Resource Trustees (as defined in paragraph 4), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607. This Consent Decree addresses the Sitcum Waterway Problem Area sediment Remedial Action and Natural Resource Damages matters with respect to the Settling Defendant.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Sitcum Waterway Problem Area, a part of the Commencement Bay Nearshore/Tideflats ("CB/NT") Superfund Site in Tacoma, Washington ("Site"), together with accrued interest; (2) performance of studies and response work by the Settling Defendant at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP"); (3) natural resource damages and associated costs arising from

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, 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 Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

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

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

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Decree and to each person representing Settling Defendant with respect to the Site or the 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 required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, the Settling Defendant shall be deemed to be in a contractual relationship with each contractor and subcontractor within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Settling Defendant" shall mean the Port of Tacoma.

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

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

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

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

"State" shall mean the State of Washington.

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

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

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

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

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

V. GENERAL PROVISIONS

5. Objectives of the Parties

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

6. Commitments by Settling Defendant

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

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7. Compliance With Applicable Law

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

8. Permits

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

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

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

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

9. Notice of Obligations to Successors-in-Title

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

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

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

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

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

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Additional Response Actions), VIII (U.S. EPA Periodic Review), and IX (Quality Assurance, Sampling and Data Analysis) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA. Within ten (10) days after the lodging of this Consent Decree, Settling Defendant shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

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

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

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

11. Remedial Design.

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

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

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

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

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

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

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

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

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

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

13. Remedial Action.

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

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

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

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

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

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

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

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

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

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

VII. ADDITIONAL RESPONSE ACTIONS

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

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

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

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

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

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

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

VIII. EPA PERIODIC REVIEW

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

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

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

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IX. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

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

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

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

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

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

X. ACCESS

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

a. Monitoring the Work;

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

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

d. Obtaining samples;

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

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

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

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

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

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

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

XI. REPORTING REQUIREMENTS

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

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