

Institutional Control Plan
For
State-owned Aquatic Lands within
Commencement Bay Nearshore/Tideflats Superfund Site:
Thea Foss and Wheeler Osgood Waterways Site

Washington State Department of Natural Resources

January 26, 2007

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1) INTRODUCTION

a) The purpose of this Institutional Control Plan is to preserve, protect, and increase the long-term protectiveness of remedial action to clean up contaminated sediments in the Thea Foss and Wheeler Osgood Waterways Site (“Site”), which represents three of eight Problem Areas within Operable Unit 01 of the Commencement Bay Nearshore/Tideflats Superfund Site (“CB N/T”). This includes a Habitat Mitigation Area associated with the confined disposal area in the St. Paul Waterway. The objective of the remedial action is to protect human health and the environment. The portion of the Site subject to this Institutional Control Plan is shown in Exhibit A (The City of Tacoma Thea Foss Waterway), Exhibit B (The “Utilities” Thea Foss Waterway), and Exhibit C (Habitat Mitigation Area).

b) Institutional controls are required to assure the continued protection of human health and the environment or the integrity of the remedial action. Institutional controls applicable to the Site are described in the Explanation of Significant Differences for the Commencement Bay Nearshore/Tideflats Superfund Site (“ESD”), dated August 2000, and the ESD dated September 2004, which modify the September 30, 1989 Record of Decision (“ROD”). Under the ESDs, institutional controls must meet the following objectives:

- i) Reduce potential exposure of marine organisms to contaminated sediments disposed of and confined in aquatic disposal sites or confined by capping; and
- ii) Reduce potential exposure to marine organisms to contaminated sediments left on the CB N/T site.

c) The Washington Department of Natural Resources (“DNR”) developed this plan in compliance with the Consent Decree negotiated between DNR and the United States of America (“USA”) and entered in the District Court for the Western District of Washington on December 17, 2003, Civil Action No. CO3-5543RBL. The Consent Decree is attached as Exhibit D, recorded with Pierce County, Washington Auditor’s Office (Recording No. 200501071091) and DNR Lands Record Office. The Consent Decree is part of an integrated settlement that includes two other consent decrees with (1) the City of Tacoma and the Funding Defendants (“the City”), entered on May 9, 2003, in *United States v. Atlantic Richfield Company, et al.*, in the United States District Court for the Western District of Washington, Civil Action No. C03-5117 RJB, and (2) Puget Sound Energy, Advance Ross Sub Company, and PacifiCorp (“the Utilities”), recorded with the Pierce County, Washington Auditor’s Office

(Recording No. 200608250717). The City and the Utilities consented to performing remedial actions in the Site.

d) DNR, the City and the Utilities entered a separate settlement agreement on August 17, 2003, in which DNR agreed to provide funds and in-kind services to support the City and the Utilities' performance of the remedial actions. The Settlement Agreement is attached as Exhibit E, recorded with Pierce County, Washington Auditor's Office (Recording No. 200609180503) and DNR Lands Record Office. This plan also is in compliance with the Settlement Agreement.

e) This Institutional Control Plan concerns only state-owned aquatic land shown in Exhibits A, B, and C. In conformance with Paragraph 38 of the Consent Decree, this plan requires DNR to implement only the institutional controls that DNR has authority to implement. The plan is integrated with institutional control plans developed by the City and the Utilities. The City's Institutional Control Plan is attached as Exhibit I. The Utilities' Institutional Control Plan is attached as Exhibit J.

2) BACKGROUND

a) **Purpose and Types of Institutional Controls.** The ESDs anticipate that the institutional control mechanisms to be used to achieve the objectives stated above include, but are not limited, to:

i) Governmental controls arising under local, state, and federal regulatory authority such as permit approval processes, zoning ordinances, regulation of maintenance activities and removal/placement of contaminated sediments and installation or removal of in-water piles to prevent exposure or migration.

ii) Maintenance of remedial areas so as to prevent exposure or migration of contaminated sediments.

iii) Prevention of uses on top of remedial areas that would disturb the integrity of the site or cause or contribute to exposure of contaminated sediments.

iv) Informational controls such as advisory signs warning the public about the danger of consuming shellfish harvested from the area and buoys to indicate no-anchorage area.

v) Proprietary controls relying on real property interests such as deed notices, restrictive covenants, and the like to prevent exposure or migration of contaminated sediments.

(1) Proprietary controls such as restrictive covenants are a common means of assuring that remedial actions, such as sediment caps, are protected even when the affected property is sold to another entity.

(2) The following explains how a restrictive covenant protects a sediment cap. The current property owner (the “grantor”) declares that (1) a property or a portion of a property (for example, the portion of the property covered with a sediment cap) is subject to certain restrictions, (2) the restrictions run with the land to bind all future owners, and (3) the EPA and/or the State have the right to enforce the covenant. In a Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) action, the covenant can include restrictions or prohibitions on certain activities, requirements that the owner allow the placement and maintenance of signs, requirements that an owner allow access for clean-up activities such as operation, maintenance or monitoring, and an obligation on the owner to provide certain notices to EPA prior to conveying right to the property to other persons.

b) **DNR’s Authority.** Under Revised Code of Washington (“RCW”) Title 79 and other constitutional and statutory mandates, DNR is responsible for management of the state-owned aquatic lands located in the Site.

i) DNR’s authority is proprietary in nature.

ii) DNR authorizes use of state-owned aquatic lands consistent with the statutory requirements through leases, easements, and other use authorizations.

iii) Constitutional and statutory provisions limit DNR’s authority to sell state-owned aquatic lands.

(1) Article XV of the Washington State Constitution prohibits DNR from selling harbor area to private persons. Article XV further prohibits the state from giving, selling or leasing “any rights whatever” in the waters beyond the harbor lines to private entities.

(2) RCW 79.94.150 prohibits the sale of tidelands to private entities.

(3) DNR has no statutory authority to sell bedlands below the extreme low tide mark.

iv) DNR has no authority to control or regulate vessel traffic, including vessel speed and incidental anchorage.

v) Aquatic lands under DNR’s management authority are subject to other interests arising under the treaties, statutes and the common law, for example, the Public Trust Doctrine. DNR has no authority to control the acts of others claiming rights under such interests.

vi) DNR has implied authority to impose a restrictive covenant on state-owned aquatic land based on the agency’s mandate to manage state-owned aquatic lands and legislative authorizations to enter into use authorizations for state-owned lands.

The usual purpose of a restrictive covenant is to bind future property-owners to an agreement made by a current property owner. Constitutional and statutory provisions limit DNR's authority to sell state-owned aquatic lands.

c) Middle Waterway Withdrawal Area

i) The City of Tacoma has implemented habitat mitigation areas on state-owned aquatic lands to meet the City's obligations under the City's consent decree.

ii) Commissioner of Public Lands ordered withdrawal from leasing of the habitat mitigation areas implemented by the City, except for habitat restoration or conservation projects. A copy of the Commissioner's Order is attached as Exhibit K.

iii) DNR's Consent Decree does not obligate the State to withdraw the area from leasing. Provision of the withdrawal area is not subject to the terms of DNR's Consent Decree.

d) Washington State Department of Transportation

i) On June 7, 1994, and under Resolution No. 846, the Washington State Harbor Line Commission established a Public Place in the portion of the Thea Foss Waterway to accommodate the State Route 509 bridge.

ii) A Public Place is a property interest in the nature of an easement granted to the Washington State Department of Transportation ("DOT") across harbor areas for the purpose of public landings, wharves or other public conveniences of commerce or navigation.

iii) DNR will provide DOT notice of this Institutional Control Plan by providing copies of the Plan and its exhibits to:

- (1) Bridge Preservation Engineer
WSDOT Bridge and Structures Office
7345 Linderson Way SW
Tumwater, WA 98501-6504
- (2) Assistant Regional Administrator
WSDOT Olympic Region
PO Box 47440
Olympia, WA 98504-7440
- (3) WSDOT Real Estate Services
PO Box 47338
Olympia, WA 98504-7338

3) INSTITUTIONAL CONTROLS TO BE IMPLEMENTED ON STATE-OWNED AQUATIC LAND

a) Restrictive Covenant

i) DNR will impose a restrictive covenant on each remedial area where a restrictive covenant is necessary to meet the institutional control objectives. Copies of the restrictive covenants for the City's work area in the Thea Foss Waterway and the Habitat Mitigation Area Associated with the Saint Paul Waterway are attached as Exhibit F and G recorded with Pierce County, Washington Auditor's Office (Recording No. 200701240768 and Recording No. 200701240769, respectively). A copy of the Restrictive Covenant for the Utilities work area is attached as Exhibit F, recorded with Pierce County, Washington Auditor's Office (Recording No. 200701240767). All three covenants also are recorded with DNR Lands Record Office.

ii) When the remedial work is complete, the parties performing the remedial action shall provide an as-built survey and legal description approved by DNR of each remedial area. The legal description shall be tied to upland markers and meet DNR's survey requirements. DNR then will complete the declaration of restrictive covenant appropriate to the remedial area and record it in DNR's Land Records Office and with the Pierce County, Washington Auditor's Office.

b) Marine Vessel Navigation and Anchoring

i) DNR will cooperate with EPA, the City, and the Utilities in working with the U.S. Coast Guard ("USCG") and the City of Tacoma in establishing and enforcing no-anchor zones where needed to protect the remedial actions.

ii) DNR shall allow entities authorized by law to control marine vessel traffic to place and maintain (1) Waterway navigational markers and (2) signs on the state-owned aquatic lands regarding prohibited activities, vessel size, and speed. Such entities include the USCG, persons authorized by the USCG, or the City of Tacoma. The City of Tacoma is authorized under RCW 35.22.280(26) and (28) to control, regulate, or prohibit the anchorage, moorage and use of boat used within its jurisdiction. The City has enacted Tacoma Municipal Code 4.10 to regulate some aspects of marine vessel traffic within the Thea Foss Waterway. DNR shall allow entities authorized by law to place and maintain navigational buoys and navigational visual aids and markers on state-owned aquatic lands. DNR shall not charge for (1) placement or (2) access to maintain such signs or navigational aids. DNR is not responsible for placement or maintenance of signs or navigational aids.

iii) DNR will cooperate with EPA, the City, and the Utilities in working with the USCG and the National Oceanic and Atmospheric Administration ("NOAA") in providing notice of changed bathymetric conditions, no-anchor zones, and navigational aids.

iv) Whenever DNR has notice of anchoring activity in a designated no-anchor zone, DNR shall notify the appropriate enforcement agency.

v) DNR shall not anchor nor allow tenants of state-owned aquatic lands to anchor on state-owned aquatic lands encumbered by a cap.

vi) If an unauthorized anchorage on state-owned aquatic land persists so long that the vessel anchored is no longer in navigation but instead is trespassing on state-owned aquatic lands, DNR shall seek to eject the trespasser as authorized under RCW 79.02.300.

vii) If an unauthorized anchorage causes waste or damage to state-owned land, DNR shall seek to recover damages and restoration as authorized under RCW 79.02.300 unless DNR finds that efforts to recover through litigation would be futile.

c) Shellfish Warnings

i) DNR will allow the Tacoma-Pierce County Health Department (“TPCHD”) and authorized entities to place and maintain multi-lingual signs on state-owned aquatic land where appropriate to warn the public about the danger of consuming shellfish harvested from the waterway. DNR shall not charge for (1) placement or (2) access to maintain such signs. DNR is not responsible for placement or maintenance of signs.

d) Leases, Easements, Rights-of-Entry, and Use Authorizations (SOAL Authorizations)

i) DNR will give EPA at least thirty (30) days written notice of a proposed lease, easement, right-of-entry, or use authorization for state-owned aquatic land (referred to collectively as “SOAL authorization”) for state-owned aquatic land within the Site. DNR will give the City at least thirty (30) days written notice of a proposed SOAL authorization for state-owned aquatic land within the City’s work area. DNR will give the Utilities at least thirty (30) days written notice of a proposed SOAL authorization for state-owned aquatic lands located within the Utilities’ work area.

ii) DNR will not issue SOAL authorizations for commercial shellfish harvest on state-owned lands remediated by a sediment cap.

iii) DNR will not renew the terms of any existing SOAL authorization for state-owned aquatic lands within the Site. DNR may issue new SOAL authorizations to holders of terminated SOAL authorizations provided such new SOAL authorizations incorporate the terms identified in 3(d)(iv).

iv) The Consent Decree requires that each SOAL authorization contain certain notice and access provisions. To comply with the Consent Decree and to

implement the institutional controls provided in this plan, DNR will incorporate the following provisions in SOAL authorizations within the Site:

(1) DNR will incorporate the following terms in new SOAL authorizations and existing SOAL authorizations that allow for amendment to accommodate new institutional controls.

- *The Property is subject to remedial action under the Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601, et seq. The property is within the Thea Foss and Wheeler-Osgood Waterways Site, which represents two of eight Problem Areas within Operable Unit 01 of the Commencement Bay Nearshore/Tideflats Superfund Site ("CB N/T").*
- *This [lease, easement, or use authorization] is subject to provisions of the Consent Decree between DNR and United States of America, entered in the District Court for the Western District of Washington on December 17, 2003, Civil Action No. CO3-5543RBL, recorded with Pierce County, Washington Auditor (Recording No. 200501071091) and recorded with DNR Lands Records Office.*
- *It is also subject to the provisions of the settlement agreement between DNR, the City, and the Utilities entered into on August 17, 2003, and recorded with Pierce County, Washington Auditor (Recording No. 200609180503) ("Settlement Agreement").*
- *Tenant shall not permit any use that is inconsistent with the Consent Decree or Settlement Agreement. Tenant shall not permit any activity on the Property that will interfere with the remedial action, or operation, maintenance and monitoring of the remedial action.*
- *Tenant shall not undertake any activity on the Property that may result in the release or exposure to the environment of contaminated sediment or of a hazardous substance that is confined by the remedy, or creates a new exposure pathway unless the proponent of the activity obtains prior written authorization from EPA and the State; provides notice to the City and/or the Utilities, as appropriate; and secures all necessary local, state, and federal permits and approvals. Activities prohibited unless otherwise approved include; but are not limited to:*
 - *Any activity that alters, modifies, or removes any sediment cap,*
 - *Piling removal and installation,*
 - *Dredging and excavation,*
 - *Harvest of shellfish embedded in aquatic lands; and,*
 - *To the extent authorized under law, anchorage. The duty to control anchorage includes the following:*
 - *[Tenant or Grantee] shall not anchor nor allow subtenants, contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees to anchor.*
 - *Where regulatory authorities have designated a no-anchor zone and [Tenant or Grantee] has notice of violators, [Tenant or Grantee] shall record the vessel*

identification (if any) and notify the City of Tacoma Police and State, regardless of whether the apparently illegal anchorage takes place on the Property or on adjacent state-owned aquatic lands,

- Where regulatory authorities have not yet designated a no-anchor zone and **[Tenant or Grantee]** has notice of third parties anchoring on the Property or adjacent state-owned aquatic lands, **[Tenant or Grantee]** shall record the vessel identification (if any) and notify the State.
- Under no circumstances shall **[Tenant or Grantee]** undertake physical eviction of third parties anchoring on Property or adjacent state-owned aquatic lands.
- In conformance with the Consent Decree, **[Tenant or Grantee]** shall cooperate with the Environmental Protection Agency (“EPA”) or its successor or its authorized agents and the Department of Ecology (“Ecology”) or its successor or its authorized agent or authorized representatives of **[the City and/or the Utilities]** in their efforts to conduct remedial activities and review the protectiveness of the remedy. This includes; but is not limited to, providing access without charge to the property for the purposes of:
 - Monitoring or performing investigations or removal, remedial, or other response actions, including dredging, on the property.
 - Verifying any data or information submitted to the United States.
 - Conducting investigations relating to contamination at or near the Site.
 - Obtaining samples.
 - Assessing the need for, planning, or implementing additional response actions that may result in substantial physical alteration of state-owned aquatic lands or resources managed by DNR, e.g., capping or dredging of sediments.
 - Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by DNR or its agents.
 - Assessing compliance with the Consent Decree.
- **[Tenant or Grantee]** shall allow entities authorized by law to control marine vessel traffic to place and maintain on the Property or Improvements (1) Waterway navigational markers and (2) signs on the state-owned aquatic lands regarding prohibited activities, vessel size, and speed. Tenant shall not charge for (1) placement or (2) access to maintain such signs or navigational aids.
- **[Tenant or Grantee]** shall allow the TPCHD to place and maintain multi-lingual signs on Property or Improvements where appropriate to warn the public about the danger of consuming shellfish harvested from the waterway. Owner shall not charge for (1) placement or (2) access to maintain such signs.
- Under the terms of the Consent Decree, EPA and Ecology will conduct periodic review of the Property at least every five (5) years. If EPA or Ecology determines that the remediation is not protective of human health and the environment, EPA or Ecology may select further response actions. Therefore, the State reserves the right to re-open and revise the terms of this **[lease, easement, or use authorization]** and its exhibits in compliance with any new EPA and/or Ecology response actions.

(2) DNR will require prospective tenants and grantees to certify that (1) that they met with EPA, the City, and/or the Utilities, to confer and review all documentation, including as-built drawings prior to issuance of the lease, and (2) they are cognizant about the extent and nature of the remedial action and the effect that it and the obligations under the Consent Decree and Settlement Agreement will have on their use of the Property, if issued a lease.

(3) DNR will incorporate the following provision in SOAL authorizations on state-owned aquatic lands subject to a restrictive covenant implemented as part of this institutional control plan: *This [lease, easement, or use authorization] is subject to a Restrictive Covenant recorded with Pierce County, Washington Auditor (Recording No. [200701240767, 200701240768, or 200701240769]), recorded with DNR Lands Records Office, and attached as Exhibit []. The provisions of the Restrictive Covenant are incorporated by reference and made a part of this Lease. In the event of a discrepancy between the terms of this [lease, easement, or use authorization] and the terms of the Restrictive Covenant, the terms of the Restrictive Covenant shall prevail. The Restrictive Covenant shall remain in effect for the term of this Lease unless revoked by DNR and EPA in accordance with Paragraph 10 of the Restrictive Covenant.*

LIST OF EXHIBITS

- A. The City of Tacoma Thea Foss Waterway
- B. The “Utilities” Thea Foss Waterway
- C. Habitat Mitigation Area
- D. U.S. v. DNR Consent Decree for the Thea Foss Waterway
- E. Settlement Agreement between DNR, Utilities, and City.
- F. Restrictive Covenant – City Remedial Area in the Thea Foss Waterway
- G. Restrictive Covenant – Habitat Mitigation Area Associated with the Saint Paul Waterway
- H. Utilities Restrictive Covenant
- I. City’s Institutional Control Plan
- J. Utilities Institutional Control Plan
- K. Commissioner’s Withdrawal Order for the Middle Waterway