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Hon. _____

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA, ON
BEHALF OF THE NATIONAL OCEANIC
AND ATMOSPHERIC
ADMINISTRATION AND THE UNITED
STATES DEPARTMENT OF THE
INTERIOR; THE STATE OF
WASHINGTON THROUGH THE
WASHINGTON DEPARTMENT OF
ECOLOGY; MUCKLESHOOT INDIAN
TRIBE; SUQUAMISH TRIBE,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

No. CV-10-758

CONSENT DECREE

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1 I. INTRODUCTION

2 The United States of America (“United States”), on behalf of the United
3 States Department of Commerce, acting through the National Oceanic and
4 Atmospheric Administration (“NOAA”), and the United States Department of
5 the Interior; the State of Washington (the “State”) through the Washington State
6 Department of Ecology; the Suquamish Tribe; and the Muckleshoot Indian Tribe
7 (collectively, “Plaintiffs”), have filed a complaint in this case against defendant
8 The Boeing Company (“Defendant” or “Boeing”) pursuant to Section 107 of the
9 Comprehensive Environmental Response, Compensation and Liability Act of
10 1980, as amended (“CERCLA”), 42 U.S.C. § 9607; the Model Toxics Control
11 Act (“MTCA”), chapter 70.105D RCW; Section 311 of the Clean Water Act
12 (“CWA”), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act
13 of 1990 (“OPA”), 33 U.S.C. § 2702(b)(2)(A) for Covered Natural Resource
14 Damages (as defined below). This Consent Decree (the “Decree”) addresses the
15 claims asserted in the Complaint against the Defendant.

16 II. RECITALS

17 A. The United States Department of Commerce, acting through
18 NOAA; the United States Department of the Interior; the Washington
19 Department of Ecology on behalf of the State of Washington; the Suquamish
20 Tribe, and the Muckleshoot Indian Tribe (collectively, “the Trustees” and,
21 individually, a “Trustee”), under the authority of Section 107(f) of CERCLA, 42
22 U.S.C. § 9607(f), Section 1006(b) of OPA, 33 U.S.C. § 2706(b), 40 C.F.R. Part
23 300, subpart G, and RCW 70.105D.040(2), serve as trustees for natural
24 resources for the assessment and recovery of damages for injury to, destruction
25 of, or loss of natural resources under their trusteeship.

26 B. Investigations conducted by the Trustees and others have detected
27 hazardous substances in the sediments, soils and groundwater of the Lower
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1 Duwamish Waterway, including but not limited to arsenic, antimony, cadmium,
2 chromium, copper, mercury, nickel, lead, zinc, bis(2 ethylhexyl) phthalate,
3 hexachlorobenzene, hexachlorobutadiene, polychlorinated biphenyls (PCBs), and
4 polycyclic aromatic hydrocarbons (PAHs). Overall, the Trustees have
5 documented the presence of over 30 hazardous substances in the marine
6 sediments of the Lower Duwamish Waterway.

7 C. The Trustees began assessing damages to natural resources in the
8 Lower Duwamish Waterway in 1990 by finding that hazardous substances had
9 been released into the Lower Duwamish Waterway; that natural resources had
10 likely been injured by the releases; that data sufficient to pursue a natural
11 resource damage assessment were available or could likely be obtained at a
12 reasonable cost; and that, without further action, future response activities would
13 not adequately remedy the resource injuries. *See, e.g.*, NOAA, Lower
14 Duwamish Waterway Sediment Characterization Study Report (Dec. 10, 1998).
15 Based on these findings, the Plaintiffs concluded that no further natural resource
16 damage assessment is required to effectuate the purposes of this Consent
17 Decree, with respect to Defendant.

18 D. Plaintiffs have filed a complaint (the “Complaint”) pursuant to
19 Section 107 of CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW;
20 CWA, 33 U.S.C. § 1251 et seq.; and OPA, 33 U.S.C. § 2701 et seq., seeking
21 recovery from Defendant of damages for injury to, destruction of, and loss of
22 natural resources resulting from releases of hazardous substances into the Lower
23 Duwamish Waterway, including the costs of assessing the damages.

24 E. Plaintiffs allege in the Complaint that Defendant owns or in the past
25 owned and/or operated real property or facilities on, adjacent to, or near the
26 Lower Duwamish Waterway. Plaintiffs further allege that from each of such
27 sites identified below by tax parcel number, storm water, surface water runoff,
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1 wastewater, other process discharges, and/or groundwater have flowed to the
2 Lower Duwamish Waterway. Plaintiffs also allege that investigations have
3 detected hazardous substances in soils, groundwater or sediments on or in those
4 properties or facilities. Some of these hazardous substances are found in the
5 sediments of the Lower Duwamish Waterway.

6 F. Plaintiffs further allege that hazardous substances have been or are
7 being released to the Lower Duwamish Waterway from properties or facilities
8 owned and/or operated by Defendant through direct discharge, surface water
9 runoff, groundwater and/or seeps, and that those hazardous substances have
10 caused injury to, destruction of and loss of natural resources in the Lower
11 Duwamish Waterway under Plaintiffs' trusteeship, including fish, shellfish,
12 invertebrates, birds, marine sediments, and resources of cultural significance.
13 Plaintiffs further allege that each of them and the public have suffered the loss
14 of natural resource services (including ecological services as well as direct and
15 passive human use losses) as a consequence of those injuries.

16 G. Plaintiffs allege that the Defendant is (a) the owner and/or operator
17 of one or more facilities; (b) a person who at the time of disposal or release of
18 any hazardous substance owned or operated any facility at which such
19 hazardous substances were disposed of; (c) a person who by contract,
20 agreement, or otherwise arranged for disposal or treatment, or arranged with a
21 transporter for transport for disposal or treatment, of hazardous substances
22 owned or possessed by such person, by any other party or entity, or otherwise
23 generated any hazardous substance disposed of or treated at any facility or
24 incineration vessel owned or operated by another party or entity and containing
25 such hazardous substances; and/or (d) a person who accepts or accepted any
26 hazardous substances for transport to disposal or treatment facilities,
27 incineration vessels or sites selected by such person from which there is a
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1 release or a threatened release of a hazardous substance that causes the
2 incurrence of response costs within the meaning of 42 U.S.C. § 9607 and RCW
3 70.105D.040.

4 H. Defendant denies all or portions of the allegations of the Complaint,
5 and all or portions of the allegations contained in Paragraphs E, F, and G, of this
6 Section.

7 I. Although the Trustees have initiated but not yet completed a natural
8 resource damage assessment for the Lower Duwamish Waterway, the Trustees
9 have developed and analyzed information sufficient to support a settlement that
10 is fair, reasonable and in the public interest.

11 J. In settlement of this action, Defendant has agreed, in lieu of and as
12 equivalent to monetary damages, to implement the habitat restoration project
13 described in Appendix A (“Boeing Habitat Project” or the “Project”). Defendant
14 has also agreed to provide funds to support project implementation costs
15 expended by the Trustees, to fund the permanent stewardship of the Project Site,
16 and to reimburse natural resource damage assessment costs incurred by the
17 Trustees.

18 K. The Project described in Appendix A is to be developed in three
19 phases. The first phase is the design and initial construction of the project. The
20 second phase is a ten year period following completion of project construction
21 during which Defendant is responsible for developing and monitoring vegetation
22 and habitat at the project site. During this ten-year period, the Defendant may be
23 required to take a number of active steps to achieve the vegetation and habitat
24 success criteria for the Project that are presented in Appendix A. The third phase
25 is an additional twenty-year period during which Defendant is responsible for
26 maintaining the vegetation and habitat developed during the second phase.
27 During and after all three phases of the Project, Defendant will take the measures
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1 needed to ensure that the Project Site remains available for, and dedicated to the
2 use of, the Project.

3 L. The Trustees have determined that the timely actions and payment
4 of certain costs to be undertaken by Defendant under this Consent Decree are
5 appropriate and necessary to protect and restore the natural resources allegedly
6 injured as a result of alleged actions or omissions of Defendant that are
7 addressed herein, and that such timely actions and expenditures are adequate to
8 redress Defendant's responsibility for the Covered Natural Resource Damages
9 that are the subject of this proceeding.

10 M. Defendant does not admit any liability to Plaintiffs arising out of
11 the transactions or occurrences alleged in the Complaint and the matters alleged
12 in this Consent Decree.

13 N. Plaintiffs and Defendant (collectively, the "Parties" and,
14 individually, a "Party") agree that this Decree addresses the resolution of
15 Plaintiffs' claims for Covered Natural Resource Damages as defined below, and
16 that neither Plaintiffs nor Defendant will use this settlement (including the terms
17 of this Decree and the basis for the compromise contained in other documents
18 filed in this action in support of this Decree) in any other forum, whether in
19 litigation, administrative proceedings, formal or informal negotiations, or
20 otherwise, to resolve, attempt to resolve, or in any way influence the resolution
21 of, other claims between Plaintiffs and Defendant in the Lower Duwamish
22 Waterway (as defined below); provided, however, that this provision does not
23 limit Plaintiffs or Defendant from using otherwise-available factual information
24 referenced in documents filed in support of this Decree. The restriction in the
25 preceding sentence applies to, but is not limited to, claims that the United States
26 (on behalf of the United States Environmental Protection Agency) and the State
27 may have against Defendant under CERCLA, the Solid Waste Disposal Act (as
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1 amended by the Resource Conservation and Recovery Act), 42 U.S.C. §§ 6901 et
2 seq., or MTCA in the Lower Duwamish Waterway (as defined below).

3 O. Plaintiffs and Defendant agree that if Defendant wishes to raise any
4 concerns with EPA regarding the effect of DSOA Work (as defined below) on
5 the Project to be constructed by Defendant pursuant to this Consent Decree,
6 Defendant will raise those concerns solely with the EPA Region that issued the
7 DSOA Order (as defined below); provided, however, that this provision does not
8 authorize any disputes under this Decree to be resolved under the dispute
9 resolution provisions of the DSOA Order.

10 P. Plaintiffs and Defendant agree, and this Court by entering this
11 Decree finds, that this Decree has been negotiated by the Parties in good faith;
12 that settlement of this matter will avoid prolonged and complicated litigation
13 between the Parties; and that this Decree is fair, reasonable, and in the public
14 interest.

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

16 III. JURISDICTION AND VENUE

17 1. This Court has jurisdiction over the subject matter of this action
18 pursuant to 28 U.S.C. §§ 1331, 1345 and 1367, 42 U.S.C. § 9613(b), and 33
19 U.S.C. § 2717(b). The Court has personal jurisdiction over the Parties. Solely
20 for the purposes of this Decree and the underlying Complaint, the Parties waive
21 all objections and defenses that they may have to jurisdiction of the Court or to
22 venue in this District. The Parties may not challenge the terms of this Decree or
23 this Court's jurisdiction to enter and enforce this Decree.

24 IV. PARTIES BOUND

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

4 3. Defendant shall provide a copy of this Consent Decree to each
5 contractor hired by Defendant to perform any of the work required by this
6 Consent Decree, and to each person representing Defendant with respect to any
7 such work, and shall condition all future contracts entered into by Defendant
8 hereunder upon performance of the work in conformity with the terms of this
9 Consent Decree. Defendant or its contractors shall provide written notice of the
10 Consent Decree to all subcontractors hired by Defendant's contractors to perform
11 any portion of the work. Defendant shall nonetheless be responsible for ensuring
12 that all work performed by its contractors and subcontractors is performed in
13 accordance with this Consent Decree.

14 V. DEFINITIONS

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

20 a. "CERCLA" means the Comprehensive Environmental
21 Response, Compensation, and Liability Act of 1980, as amended, 42 U S C. §
22 9601, *et seq.*

23 b. "Consent Decree" or "Decree" means this Consent Decree and
24 all attached appendices. In the event of a conflict between this Consent Decree
25 and any Appendix, the Consent Decree will control.

26 c. "Covered Natural Resource Damages" means damages,
27 including costs of damage assessment, recoverable under Section 107 of
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1 CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW; Section 311 of the Clean
2 Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002 of the Oil Pollution
3 Act of 1990 (“OPA”), 33 U.S.C. § 2702(b), for injury to, destruction of, or loss
4 of natural resources resulting from releases of hazardous substances or
5 discharges of oil to the Lower Duwamish Waterway and/or Elliott Bay, where
6 such release or discharge occurred on or before the effective date of this Consent
7 Decree, at the following locations: Boeing Developmental Center (tax parcels
8 0003400018, 0003400026, 0003400028, 0003400048, 0423049016,
9 0423049047, 0423049183, 5624200990, 5624200992, 5624201032,
10 5624201036, 5624201038); Museum of Flight (tax parcel 5624201034); Boeing
11 Thompson Site (tax parcel 0007400033); Isaacson Site (tax parcel 0001600014);
12 South Park Site (tax parcels 7883608601, 7883608603); Boeing Plant 2 (tax
13 parcels 0001600020, 0022000005, 0022000165, 0022000195, 2185000005,
14 2824049009, 2924049056, 2924049098, 2924049112, 3324049002); and Boeing
15 Field (tax parcels 2924049066, 2924049106). Damages, injury to, destruction of,
16 or loss of natural resources resulting from releases of hazardous substances
17 originating from Defendant’s operations or activities outside of the tax parcels
18 identified in this sub-paragraph are not included in Covered Natural Resource
19 Damages, even if those hazardous substances reach the Lower Duwamish
20 Waterway by flowing over, under, or through one or more of the tax parcels
21 identified in this sub-paragraph.

22 d. “Day” means a calendar day. In computing any period of time
23 under this Consent Decree, where the last day falls on a Saturday, Sunday, or
24 federal holiday, the period of time will run until the close of business of the next
25 working day. “Working day” means a day other than a Saturday, Sunday, or
26 Federal holiday.

27 e. “Defendant” means The Boeing Company.
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1 f. "DSOA Order" means the Resource Conservation and
2 Recovery Act Administrative Order on Consent agreed upon by the Defendant
3 and the U.S. Environmental Protection Agency, EPA Docket No. 1092-01-22-
4 3008(h).

5 g. "DSOA Work" means the corrective measures being
6 developed and implemented by Defendant to address the contamination in the
7 Plant 2 Duwamish Sediments Other Area ("DSOA") pursuant to the DSOA
8 Order.

9 h. "Elliott Bay" means any portion of Elliott Bay (including the
10 shoreline, intertidal areas, tributaries, estuaries and bottom sediments) in the
11 State of Washington where hazardous substances originating from the parcels
12 identified in the definition of Covered Natural Resource Damages have come to
13 be located.

14 i. "Lower Duwamish Waterway" means any portion of the
15 Duwamish Waterway (including the shoreline, intertidal areas, tributaries,
16 estuaries and bottom sediments) in the State of Washington where hazardous
17 substances originating from the parcels identified in the definition of Covered
18 Natural Resource Damages have come to be located.

19 j. "Lower Duwamish Waterway Stewardship Account" means
20 the account to be authorized for receipt of funds to be paid by the Defendant for
21 the Trustees' permanent stewardship of the Project Site.

22 k. "MTCA" means the Model Toxics Control Act, Chapter
23 70.105D RCW.

24 l. "Natural Resources" means that definition as provided in 42
25 U.S.C. § 9601(16).

26 m. "Parties" means the United States, the State of Washington,
27 the Suquamish Tribe, the Muckleshoot Indian Tribe, and Defendant.
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1 n. "Plaintiffs" means the United States, the State, the Suquamish
2 Tribe, and the Muckleshoot Indian Tribe.

3 o. "Project" means all of the work and other commitments as
4 described in Appendix A.

5 p. "Project Site" means the areas outlined in Appendix A.

6 q. "Trustees" mean the United States Department of Commerce,
7 acting through NOAA; the United States Department of the Interior; the
8 Washington State Department of Ecology, on behalf of the State of Washington;
9 the Suquamish Tribe; and the Muckleshoot Indian Tribe.

10 VI. GENERAL PROVISIONS

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

12 6. Nothing in this Consent Decree shall be construed as an admission
13 of liability by Defendant for any claims or allegations made in the Complaint or
14 in this Consent Decree.

15 7. This Consent Decree shall not be used as evidence of Defendant's
16 alleged liability in any action or proceeding other than an action or proceeding to
17 enforce the terms of this Consent Decree.

18 8. All activities undertaken by Defendant pursuant to this Consent
19 Decree shall be performed in accordance with the requirements of all applicable
20 laws and permits.

21 9. Defendant shall ensure that all work performed under this Consent
22 Decree shall be conducted as set forth in Appendix A attached hereto. If the
23 Trustees determine that Defendant is not complying with the requirements set
24 forth in the Decree and Appendix A, the Trustees shall provide prompt written
25 notice to Defendant specifying the basis for their determination of
26 noncompliance. Defendant may correct the noncompliance or invoke the dispute
27 resolution procedures set forth in Section XIV below. The Trustees may require
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1 Defendant to take actions, to alter, suspend or cease ongoing activities, and to
2 alter, postpone or refrain from taking proposed actions, as are necessary to ensure
3 compliance with the terms of this Consent Decree and any plans or proposals
4 adopted hereunder. If Defendant disputes any such requirements imposed by the
5 Trustees, the Defendant may invoke the dispute resolution procedures set forth in
6 Section XIV below.

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

9 11. Where any portion of the activities undertaken pursuant to this
10 Consent Decree requires a federal, state or local permit or approval, Defendant
11 shall submit timely and complete applications and take all other actions
12 necessary to obtain such permits or approvals. The Defendant may seek relief
13 under the provisions of Section XVI (Force Majeure) of this Consent Decree for
14 any delay in the performance of the Project resulting from a failure to obtain, or a
15 delay in obtaining, any permit required for the Project.

16 12. The Plaintiffs do not, by their consent to the entry of this Consent
17 Decree, warrant or aver in any manner that Defendant's compliance with this
18 Consent Decree will result in compliance with CERCLA or any other law.
19 Compliance with this Consent Decree does not diminish or affect Defendant's
20 responsibility to comply with any applicable federal, state or local law or
21 regulation. The Parties agree that Defendant is responsible for achieving and
22 maintaining complete compliance with all applicable federal, state and local
23 laws, regulations and permits.

24 VII. PROJECT DEVELOPMENT

25 13. Defendant shall finance and construct the Project and shall perform
26 any additional activities in accordance with the terms set out in Appendix A.

1 Initial Design and Construction Activities

2 14. Construction Schedule and Contingencies.

3 a. After completion of necessary design work as described in
4 Appendix A, and after EPA's and the Trustees' approval in writing of such final
5 design work, Defendant shall commence construction on the Project within
6 ninety (90) days (subject to the in-water construction work windows) of
7 receiving written authorization from the Trustees. The Trustees' written
8 authorization will be provided after: (1) the Trustees verify that the United States
9 Environmental Protection Agency (EPA) has reviewed and approved
10 Defendant's work plan as appropriate and consistent with Defendant's DSOA
11 Work as defined in Paragraph 4(g) and Defendant's work as one of the
12 Respondents to EPA's LDW SF Site remedial investigation/feasibility study
13 (RI/FS) Order, Docket No. CERCLA-10-2001-0055, and any response action
14 decisions for the LDW SF Site that EPA may have made, or may or expects to
15 make, that may affect the Project; and (2) other reviews and determinations by
16 the Trustees, including but not limited to those identified in the Scope of Work in
17 Appendix A.

18 b. If Defendant has not completed construction of the Project
19 prior to December 31, 2014, then Defendant shall either (i) pay to the Trustees
20 the sum of \$250,000 as compensation for the additional delay in restoration of
21 natural resources, or (ii) perform additional restoration work outside of the
22 Project Site agreed upon in writing by Defendant and the Trustees. For each
23 subsequent year in which Defendant has not completed construction of the
24 Project prior to December 31, Defendant shall either (i) pay to the Trustees the
25 sum of \$250,000 as compensation for the additional delay in restoration of
26 natural resources, or (ii) perform additional restoration work outside of the
27 Project Site agreed upon in writing by Defendant and the Trustees. Defendant's
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1 obligations under this subparagraph are in addition to any other obligations or
2 applicable penalties under this Decree and are not subject to the provisions of
3 Section XVI (Force Majeure).

4 c. If Defendant has not received from the Trustees written
5 authorization to commence construction pursuant to Paragraph 14(a) by
6 December 31, 2017, then the following contingency measures become
7 applicable:

8 (i) The Trustees may request in writing that Defendant
9 finance and construct a project or projects other than the Project described in
10 Appendix A, but which in the opinion of the Trustees is equivalent with respect
11 to ecological function, size, configuration and location as the Project. If
12 Defendant and Trustees are able to reach an agreement, the Parties may amend
13 this Consent Decree to substitute a new project or projects for the Project
14 described in Appendix A.

15 (ii) If the Trustees request a substitute project or projects
16 under the terms of Paragraph 14(c)(i), and the Trustees and Defendant are unable
17 to agree upon a substitute project or project, then the Trustees or Defendant may
18 send written notice that a final impasse among the parties has been reached. In
19 that event, this Consent Decree (including but not limited to the provisions of
20 Section XVIII (Plaintiffs' Covenant Not To Sue), Section XX (Defendant's
21 Covenant Not To Sue), and Section XXI (Effect Of Settlement; Contribution
22 Protection)) shall become null and void, and Defendant shall have no further
23 obligations to the Trustees under this Consent Decree; except, however, that in
24 this event, the provisions of Paragraph 14(c)(iii) shall then become applicable
25 and shall be the only provisions of this Consent Decree that remain in effect.

26 (iii) In the event that a final impasse is reached under the
27 provisions of Paragraph 14(c)(ii), the provisions in this Paragraph 14(c)(iii) shall
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1 become applicable and shall survive the termination of the Consent Decree. The
2 Trustees shall have no obligation to refund any monies that have been paid or
3 expended by Defendant pursuant to this Decree (including but not limited to
4 monies paid pursuant to Section VII (Project Development), Section X
5 (Reimbursement of Restoration Implementation Costs), Section XI
6 (Reimbursement of Past Costs), and Section XV (Stipulated Penalties)), nor shall
7 Defendant have any right to request or receive any refunds or reimbursements of
8 any such monies. In consideration for monies paid by Defendant pursuant to this
9 Consent Decree that are not refunded, Plaintiffs covenant not to seek, in any
10 future proceeding against Defendant for natural resource damages in the Lower
11 Duwamish Waterway or Elliott Bay, natural resource damage assessment costs or
12 other costs incurred on or before the last Billing Date that have been paid by
13 Defendant pursuant to Paragraph 30 (Reimbursement of Restoration
14 Implementation Costs).

15 (iv) The provisions of Paragraph 14(c) are not subject to the
16 provisions of Section XIV (Dispute Resolution) of the Consent Decree.

17 15. Within 60 days after completion of construction of the Project,
18 Defendant shall submit a written Notice of Completion to the Trustees. The
19 Trustees shall review the course and results of the development of the Project to
20 determine whether the Project has been completed in accordance with Appendix
21 A. Within 60 days after receiving the Notice of Completion, the Trustees shall
22 submit to Defendant either (a) a written notice identifying specific deficiencies
23 the Trustees determine must be satisfied for the Project to be completed in
24 accordance with Appendix A (Notice of Deficiencies); or (b) a written notice of
25 the Trustees' determination that the Project has been so completed (Notice of
26 Approval of Completion). The date of the Trustees' Notice of Approval of
27 Completion shall constitute the "Construction Completion Date." Following
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1 receipt of a Notice of Deficiencies, Defendant shall correct the identified
2 deficiencies and complete the Project in accordance with Appendix A, and
3 submit to the Trustees an amended Notice of Completion for review and response
4 in accordance with this Paragraph. Any delay in completing Project construction
5 as a result of the operation of this Paragraph shall not in and of itself constitute
6 grounds for relief from the requirement to pay stipulated penalties under Section
7 XV for compliance delays.

8 16. In order to ensure permanent preservation of the Project Site and its
9 associated ecological values, within sixty (60) days of the Construction
10 Completion Date, Defendant will record, enter into agreements, or otherwise take
11 appropriate actions with respect to the Project Site, including its property and
12 property owned by the Port of Seattle, to effectuate the provisions set forth in
13 Appendix B.

14 Development and Monitoring of Vegetation and Habitat

15 17. Defendant shall develop and monitor vegetation and habitat for a
16 period of ten years from the Construction Completion Date, as more fully
17 described in Appendix A. Upon completion of the ten-year period, Defendant
18 shall provide written Notice of Completion of Vegetation and Habitat
19 Development And Monitoring Obligations to Trustees in accordance with
20 Section XXIII (Notices and Submissions). Within 45 days after receiving the
21 Notice of Completion of Vegetation and Habitat Development And Monitoring
22 Obligations, the Trustees shall submit to Defendant either (a) a written notice
23 identifying specific deficiencies the Trustees determine must be satisfied for the
24 vegetation and habitat development and monitoring obligations to be completed
25 in accordance with Appendix A (Notice of Deficiencies); or (b) a written notice
26 of the Trustees' determination that the vegetation and habitat development and
27 monitoring obligations are completed (Approval of Completion of Vegetation
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1 and Habitat Development And Monitoring Obligations). The date of the
2 Trustees' Approval of Completion of Vegetation and Habitat Development And
3 Monitoring Obligations shall constitute the "Vegetation and Habitat
4 Development and Monitoring Completion Date."

5 Continued Maintenance of Developed Vegetation and Habitat

6 18. Defendant shall be responsible for maintaining vegetation and other
7 habitat attributes, for controlling invasive vegetation and debris removal, and for
8 undertaking corrective actions for any perturbation that affects the ecological
9 integrity of the Project. The Parties' intention is that the ecological functions
10 provided by the habitat projects be maintained in perpetuity. For purposes of this
11 Decree, Boeing's responsibility for active maintenance and corrective action
12 shall extend thirty (30) years from the Construction Completion Date, or sooner
13 if a "force majeure" event makes further maintenance impossible. Perturbations
14 include events with a foreseeable probability of occurrence (such as, for example,
15 the beaching of an abandoned barge) but do not include "force majeure" events.
16 After the Construction Completion Date, Defendant shall not be responsible for
17 repairs or corrective actions to the Project required due to any "force majeure"
18 events.

19 19. Defendant shall provide for continued maintenance and corrective
20 actions in accordance with Paragraph 18, whether Defendant owns the Project
21 Site or transfers ownership of the Project Site. The Trustees recognize that the
22 Project Site may include property that is owned by other parties including, but
23 not limited to, the Port of Seattle. Defendant recognizes that it is solely
24 responsible for securing the cooperation of other property owners, including but
25 not limited to the Port of Seattle, in order to successfully complete and maintain
26 the project in accordance with Appendix A. Any failure by Defendant to
27 successfully complete or maintain the project in accordance with Appendix A
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1 resulting from disputes with other property owners, including but not limited to
2 the Port of Seattle, shall not constitute a “force majeure” event.

3 Transfer of Project Site for Permanent Stewardship

4 20. Within sixty (60) days of the Construction Completion Date,
5 Defendant shall ensure, both with respect to the portion of property it owns
6 within the Project Site and with respect to the portion of the Project Site owned
7 by the Port of Seattle, that the property will not be used in a manner inconsistent
8 with the requirements of this Consent Decree. In Defendant’s sole discretion, it
9 may elect to transfer ownership of the portion of the Project Site it owns to an
10 entity to be identified by the Plaintiffs. If transfer of ownership of Defendant’s
11 property occurs prior to the expiration of Defendant’s obligations in Paragraph
12 18, such transfer shall not affect or lessen Defendant’s obligations under that
13 Paragraph, and the entity to which any property is transferred shall provide
14 Defendant with all access necessary to fulfill Defendant’s responsibilities under
15 Paragraph 18.

16 General Project Development Provisions

17 21. Defendant shall avoid taking any action that is inconsistent with this
18 Consent Decree and that would adversely affect the Project.

19 22. Defendant shall undertake all activities required to address cultural
20 resource issues associated with the Project, including, as applicable, consultation
21 with tribes and the Washington State Department of Archaeology and Historic
22 Preservation, conducting a background and project review by an archaeologist
23 who meets the Department of Interior’s professional qualification standards at 36
24 C.F.R. Part 61, conducting cultural resource surveys or monitoring activities.

25 23. If Defendant determines that the Project will become cost-
26 prohibitive or if there is some other significant problem that will prevent the
27 Project from being constructed as designed, other than delay in obtaining EPA
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1 approval as set forth in Paragraph 14(a), then the following contingency
2 measures become applicable:

3 a. Defendant may propose a project or projects other than the
4 Project described in Appendix A, but which is equivalent with respect to
5 ecological function, size, configuration and location as the Project. Such
6 substitute project shall be subject to approval and acceptance by the Trustees. If
7 Defendant and Trustees are able to reach an agreement, the Parties may amend
8 this Consent Decree to substitute a new project or projects for the Project
9 described in Appendix A.

10 b. If Defendant requests a substitute project or projects under the
11 terms of Paragraph 23(a) and the Trustees and Defendant are unable to agree
12 upon a substitute project or project, then the Trustees or Defendant may send
13 written notice that a final impasse among the parties has been reached. In that
14 event, this Consent Decree (including but not limited to the provisions of Section
15 XVIII (Plaintiffs' Covenant Not To Sue), Section XX (Defendant's Covenant
16 Not To Sue), and Section XXI (Effect Of Settlement; Contribution Protection))
17 shall become null and void, and Defendant shall have no further obligations to
18 the Trustees under this Consent Decree; except, however, that in this event, the
19 provisions of Paragraph 23(c) shall then become applicable and shall be the only
20 provisions of this Consent Decree that remain in effect.

21 c. In the event that a final impasse is reached under the
22 provisions of Paragraph 23(b), the provisions in this Paragraph 23(c) shall
23 become applicable and shall survive the termination of the Consent Decree. The
24 Trustees shall have no obligation to refund any monies that have been paid or
25 expended by Defendant pursuant to this Decree (including but not limited to
26 monies paid pursuant to Section VII (Project Development), Section X
27 (Reimbursement of Restoration Implementation Costs), Section XI
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1 (Reimbursement of Past Costs), and Section XV (Stipulated Penalties)), nor shall
2 Defendant have any right to request or receive any refunds or reimbursements of
3 any such monies. In consideration for monies paid by Defendant pursuant to this
4 Consent Decree that are not refunded, Plaintiffs covenant not to seek, in any
5 future proceeding against Defendant for natural resource damages in the Lower
6 Duwamish Waterway or Elliott Bay, natural resource damage assessment costs or
7 other costs incurred on or before the last Billing Date that have been paid by
8 Defendant pursuant to Paragraph 30 (Reimbursement of Restoration
9 Implementation Costs) or Paragraph 31 (Past Cost Reimbursement).

10 d. A determination by Defendant under the terms of Paragraph
11 23 that the Project has become cost-prohibitive or that there is some other
12 significant problem that will prevent the Project as described in Appendix A from
13 being constructed is subject to the provisions of Section XIV (Dispute
14 Resolution). The provisions of Paragraphs 23(b) and 23(c) regarding an impasse
15 between the Defendant and Trustees on a substitute project or projects and
16 regarding monies paid or expended by Defendant shall not be subject to the
17 provisions of Section XIV (Dispute Resolution).

18 24. The Trustees reserve the right to conduct additional work
19 themselves, at their own expense, on the Project Site. If such work is conducted
20 prior to completion of initial construction by Defendant, the Trustees will
21 conduct any such work in a manner that does not hinder Defendant's timely
22 completion of the Project. Prior to performing additional work pursuant to this
23 Consent Decree, the Trustees shall prepare and provide to Boeing a Health and
24 Safety Plan. In no event shall the Trustees perform any additional work that will
25 interfere with Defendant's obligations under this Consent Decree or the
26 construction, maintenance, operation, or monitoring of the Project or that
27 otherwise affects the performance criteria of this Consent Decree.
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1 VIII. ACCESS TO INFORMATION AND PROJECT SITE

2 25. To facilitate their oversight responsibilities, the Trustees shall have
3 full access to the Project Site for purposes of inspecting or observing Defendant's
4 progress in implementing the Project required under this Consent Decree.

5 26. Commencing upon the date of lodging of this Consent Decree,
6 Defendant agrees to provide the Trustees and their contractors access at all
7 reasonable times to the Project Site and to any property under the control of
8 Defendant to which access is required for the oversight or implementation of this
9 Consent Decree. This right of access does not include a right to enter
10 Defendant's buildings. Where the property to which access is sought is not
11 otherwise open to public access, the Trustees shall give notice prior to access.
12 Each Trustee shall have the authority to enter freely and move about such
13 property at all reasonable times for the purposes of overseeing the requirements
14 of this Consent Decree, including, but not limited to:

- 15 a. Monitoring and assessing progress on the planning,
16 development, maintenance and monitoring of the Projects;
- 17 b. Verifying any data or information submitted to the Trustees;
- 18 c. Inspecting and copying records, operation logs, contracts or
19 other documents maintained or generated by Defendant or its contractors
20 hereafter retained to perform work undertaken pursuant to this Consent Decree;
- 21 d. Conducting such tests, investigations or sample collections as
22 deemed necessary to monitor compliance with this Consent Decree, investigate
23 or assess contamination at or near the Project Site, or to assist in further
24 identifying and quantifying natural resource injuries requiring restoration actions
25 and in planning and carrying out further restoration actions.

26 27. Plaintiffs may direct that Defendant use, in a manner consistent with
27 Defendant's policy on the control of photographic devices, a camera, sound
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1 recording device or other type equipment to record the work done under this
2 Consent Decree or injury to natural resources and provide copies of any such
3 recordings to the Trustees. Defendant may retain a copy of any such photographs
4 or video recordings. Trustees may also use their own camera, sound recording
5 device, or other type equipment to record the work done under this Consent
6 Decree or injury to natural resources. However, unless Defendant consents,
7 during any visit to the Project Site the Trustees may not photograph or otherwise
8 record the interiors of Defendant's buildings or any of Defendant's equipment,
9 vehicles, machinery, or other devices that have or may have commercial or
10 defense-related sensitivity.

11 28. Defendant shall have the right to accompany any Trustee or its
12 representative on the property for purposes of security at the Project Site, and
13 Trustees and their representatives shall comply with applicable health and safety
14 precautions and security-related laws. If any Trustee or its representative seeks
15 to perform duties at the Project Site in a manner that is not in compliance with
16 any written Project Site health and safety requirement, plan, or rule, or any
17 applicable federal or state law or promulgated regulation, Defendant may
18 verbally notify such Trustee or representative of the non-compliance and may
19 further notify such Trustee of such non-compliance in writing. Defendant shall
20 not be obligated, pursuant to Section XVII of this Decree, to indemnify anyone
21 for any claims, damages, or injuries caused by a Trustee's failure to comply with
22 the applicable health and/or safety requirement, rule, plan, law or regulation,
23 where verbal or written notice of such noncompliance was provided by
24 Defendant prior to the performance of actions which caused the claims, damages,
25 or injuries. Defendant further shall have the right (a) to copies of results of all
26 tests or investigations conducted by the Trustees pursuant to this Decree; and (b)
27 to split samples taken by the Trustees pursuant to this Decree. No claim of
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1 confidentiality shall be made with respect to any data, including, but not limited
2 to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or
3 engineering data, or any other documents or information evidencing conditions at
4 or around the Project Site.

5 IX. SELECTION OF CONTRACTORS

6 29. The selection of any contractor hereafter retained by Defendant to
7 perform any of the work required under this Consent Decree shall be subject to
8 Trustee approval. Defendant shall notify the Trustees in writing of the name,
9 title and qualifications of any contractor Defendant proposes to retain, and of any
10 proposed changes in the selection of a contractor. The Trustees will notify
11 Defendant in writing of the approval or disapproval of a proposed contractor.
12 The Trustees' assent to the proposed selection or change of a contractor may be
13 presumed unless the Trustees notify Defendant in writing of their objection to the
14 proposed selection or change within 30 days of Defendant's written selection
15 notice.

16 X. REIMBURSEMENT OF RESTORATION IMPLEMENTATION COSTS

17 30. Defendant agrees to reimburse the Trustees' reasonable costs
18 incurred in implementing and overseeing the Project described in Appendix A to
19 this Consent Decree. The period during which the Trustees will incur
20 implementation costs begins on June 1, 2009 and ends on the ending date of
21 Defendant's responsibility for active maintenance and corrective action, as set
22 forth in Paragraph 18. Defendant shall reimburse these costs as follows:

23 a. Each year, beginning in 2010, the Trustees shall provide
24 Defendant with an invoice detailing their reasonable costs of implementing and
25 overseeing the Project between June 1 of the prior calendar year and May 31 of
26 the current calendar year. Within sixty (60) days of receipt of the Trustees'
27 invoice, Defendant shall reimburse the Trustees for those costs. If Defendant
28

1 believes that any of the Trustees' invoiced costs are not reasonable, Defendant
2 may invoke the Dispute Resolution provisions of Section XIV as to the disputed
3 costs only; any costs for which Defendant does not invoke Dispute Resolution
4 shall be paid within sixty (60) days of receipt of the Trustees' invoice.

5 b. At any time after receipt by Defendant of authorization by the
6 Trustees to begin construction of the project pursuant to Paragraph 14(a), the
7 Trustees and Defendant will seek to negotiate a lump-sum payment by Defendant
8 to the Trustees for the remainder of the Trustees' anticipated implementation
9 costs. If Defendant and the Trustees reach agreement on a lump-sum payment,
10 then Defendant's obligations to make annual payments of the Trustees reasonable
11 implementation and oversight costs pursuant to Paragraph 30(a) shall be fully
12 and finally satisfied upon receipt by the Trustees of Defendant's lump-sum
13 payment. Such a lump-sum payment shall be made as follows: The Trustees
14 shall petition the Court to establish the Lower Duwamish Waterway
15 Implementation Account for use as the Trustees shall determine, in accordance
16 with the terms of this Consent Decree and other applicable law, to fund the
17 Trustees' implementation and oversight of the Project. Payment shall be
18 deposited with the Registry of the Court by EFT if the Registry of the Court
19 accepts payment in that form, and if not, by certified check, bearing the notation
20 "The Boeing Company – Implementation Account" and the civil action number
21 assigned to this Consent Decree, made payable and addressed as follows:

22 Payee: Clerk of the Court
23 Address: Clerk, U.S. District Court U.S. Courthouse
 700 Stewart Street
 Seattle, WA 98101
24 Memo: For Deposit into the Lower Duwamish Waterway
25 Implementation Account: [INSERT THIS CASE DOCKET NUMBER]

1 XI. PAST COST REIMBURSEMENT

2 31. Within forty-five (45) days of entry of this Decree, Defendant will
3 pay to the Trustees sums totaling one million nine hundred forty-three thousand
4 one hundred eighty-four dollars and eighty-six cents (\$1,943,184.86) in damage
5 assessment costs through May 31, 2009. These sums shall be paid in the
6 following amounts and particulars:

7 Trustee: National Oceanic and Atmospheric Administration
8 Amount: One million six hundred eighty-three thousand two hundred thirty-
nine dollars and ten cents (\$1,683,239.10)

9 Trustee: U.S. Department of the Interior
10 Amount: One hundred eighty-four thousand, five hundred seventeen dollars
and fifty-nine cents (\$184,517.59)

11 Payments to NOAA and the U.S. Department of the Interior shall be made
12 by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice
13 account in accordance with current EFT procedures. Payment shall be made in
14 accordance with instructions provided to Defendant by the Financial Litigation
15 Unit of the U S. Attorney’s Office of the Western District of Washington. Any
16 payments received by the Department of Justice after 4:00 p.m. Eastern Standard
17 Time shall be credited on the next business day. Defendant shall provide at least
18 five days notice to the Financial Litigation Unit before making the transfer.

19 Payments to the other Trustees shall be made by certified checks, bearing
20 the notation “The Boeing Company – Lower Duwamish Waterway Assessment
21 Costs” in the amounts indicated and made payable and addressed as follows:

22 Trustee: State of Washington
23 Amount: Fifty-four thousand two hundred ninety-one dollars and
seventeen cents (\$54,291.17)
24 Payee: State of Washington/Department of Ecology
Address: State of Washington
Department of Ecology
25 Attention: Fiscal Office
26 P.O. Box 47611
Lacey, WA 98504-7611
27
28

1 Trustee: Suquamish Tribe
2 Amount: Twenty-one thousand one hundred thirty-seven dollars
3 (\$21,137)
4 Payee: Suquamish Tribe
5 Address: Melody Allen
6 Suquamish Tribe
7 Legal Department
8 P.O. Box 498
9 Suquamish, WA 98392-0498

6 32. At the time of each payment Defendant will send notice that payment
7 has been made to the Trustees and DOJ in accordance with Section XXIII
8 (Notices and Submissions). Such notice will reference Lower Duwamish
9 Waterway NRDA, DOJ case number 90-11-3-7227/1, and the civil action
10 number.

11 XII. FUND FOR PERMANENT STEWARDSHIP OF PROJECT SITE

12 33. Within forty-five (45) days of receipt from the Trustees of written
13 authorization to commence construction of the Project pursuant to Paragraph
14 14(a), Defendant shall make a payment in the total amount of three hundred sixty
15 thousand dollars (\$360,000) to fund permanent stewardship of the Project. Prior
16 to authorizing commencement of construction, the Trustees shall petition the
17 Court to establish the Lower Duwamish Waterway Stewardship Account for use
18 as the Trustees shall determine, in accordance with the terms of this Consent
19 Decree and other applicable law, to permanently maintain and manage the project
20 sites, including protection of their ecological values. Payment shall be deposited
21 with the Registry of the Court by EFT if the Registry of the Court accepts
22 payment in that form, and if not, by certified check, bearing the notation “The
23 Boeing Company – Stewardship Account” and the civil action number assigned
24 to this Consent Decree, made payable and addressed as follows:

25 Payee: Clerk of the Court
26 Address: Clerk, U.S. District Court
27 U.S. Courthouse
28 700 Stewart Street
Seattle, WA 98101

1 Memo: For Deposit into the Lower Duwamish Waterway Stewardship
2 Account [INSERT THIS CASE DOCKET NUMBER]

3 Defendant shall send photocopies of each check and any transmittal letter to:
4 Chief; Environmental Enforcement Section, Department of Justice, P.O. Box
5 7611, Ben Franklin Station, Washington, D.C. 20044; and to Laurie Lee, NOAA
6 Office of General Counsel, 501 W. Ocean Blvd., Suite 4470, Long Beach, CA,
7 90802. Any funds paid pursuant to this Paragraph that are not utilized by the
8 Trustees to fund permanent stewardship of the project sites may be applied by the
9 Trustees toward one or more additional habitat restoration projects in the Lower
10 Duwamish Waterway.

11 XIII. FAILURE TO MAKE TIMELY PAYMENTS

12 34. If Defendant fails to make any payment under Paragraphs 30, 31, or
13 33 by the required due date, interest shall be assessed at the rate specified for
14 interest on investments of the EPA Hazardous Substance Superfund established
15 by 26 U.S.C. § 9507, compounded annually on October 1 of each year in
16 accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in
17 effect at the time the interest accrues. The rate of interest is subject to change on
18 October 1 of each year. Interest on late payments shall accrue beginning on the
19 date of entry of the Consent Decree through the date on which the payment is
20 made.

21 XIV. DISPUTE RESOLUTION

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

25 36. Any dispute which arises under or with respect to this Consent
26 Decree shall in the first instance be the subject of informal negotiations between
27 the Trustees and Defendant. The period for informal negotiations shall not
28 exceed twenty-one (21) days from the time the dispute arises, unless the parties to

1 the dispute agree otherwise in writing. The dispute shall be considered to have
2 arisen when the Trustees send Defendant a written notice specifying the nature of
3 the dispute and requested relief (“Notice of Dispute”) or Defendant sends the
4 Trustees a written Notice of Dispute.

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

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

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

21 d. The Defendant and the Trustees each shall identify a Formal
22 Dispute Resolution Representative, who shall meet to discuss the matter in
23 dispute at the earliest available opportunity and who will meet and work in good
24 faith to resolve the matter in dispute. If the Parties fail to resolve the dispute
25 within twenty-one (21) days after the initial meeting of the Formal Dispute
26 Resolution Representatives, then the position advanced by the Trustees in their
27 Statement of Position shall be considered binding upon Defendant, subject to any
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1 agreements the Formal Dispute Resolution Representatives may have reached on
2 one or more issues. In such event, the Trustees shall within five (5) days of the
3 conclusion of the formal dispute resolution process notify Defendant in writing
4 that the formal dispute resolution process has concluded. Defendant may seek
5 judicial review of the Trustees' Statement of Position (as modified by any
6 agreements the Formal Dispute Resolution Representatives may have reached)
7 pursuant to the following Subparagraph.

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

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

26 g. The foregoing notwithstanding, the Parties acknowledge that
27 disputes may arise that require resolution on an expedited basis. In such cases,
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1 the Parties shall agree on an expedited schedule or, absent prompt agreement,
2 either Defendant or the Trustees may petition the Court for the imposition of an
3 expedited schedule.

4 38. The invocation of formal dispute resolution procedures under this
5 Section shall not extend, postpone, or affect in any way any obligation of the
6 Defendant under this Consent Decree, not directly in dispute, unless the Trustees
7 or the Court agree otherwise. Stipulated penalties with respect to the disputed
8 matter shall continue to accrue, but payment otherwise required under Section
9 XV shall be stayed pending resolution of the dispute. Notwithstanding the stay of
10 payment, stipulated penalties shall continue to accrue from the first day of
11 noncompliance with any applicable provision of this Consent Decree. In the
12 event that the Defendant does not prevail on the disputed issue, stipulated
13 penalties shall be assessed and paid as provided in Section XV (Stipulated
14 Penalties).

15 XV. STIPULATED PENALTIES

16 39. The Parties stipulate that the time period for implementing the
17 Project is a significant factor in the settlement reached in this Decree and that
18 delay in carrying out the activities required in this Decree may diminish the
19 compensatory value attributable to those activities. Consequently, in the event
20 that Defendant fails to meet a requirement in this Decree (subject to any
21 modifications agreed to under Section XXVII) and any delay is not excused
22 through operation of the provisions of Section XVI (Force Majeure), Defendant
23 shall, as a stipulated penalty, increase the financial contributions it makes under
24 this Consent Decree to fund habitat restoration actions, over and above any
25 payments required elsewhere under this Consent Decree, as follows:

26 a. For each week Defendant fails to comply with any requirement
27 in the Decree, Defendant shall pay a stipulated penalty in the amount of \$1,000.
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1 Where the delay extends beyond the second week, the stipulated penalty shall
2 apply to each additional day of delay for each such missed requirement. For
3 purposes of this Subparagraph, a week shall equal a continuous period of seven
4 days. Nothing in this Decree prevents the simultaneous accrual of separate
5 penalties for separate violations of this Decree.

6 b. All penalties shall begin to accrue on the day after the
7 complete performance is due or the day a violation occurs, and shall continue to
8 accrue through the final day of the correction of the noncompliance or completion
9 of the activity. Following the Trustees' determination that Defendant has failed
10 to comply with a requirement of this Consent Decree, the Trustees may give
11 Defendant written notification of the same and describe the noncompliance. The
12 Trustees may send the Defendant a written demand for the payment of the
13 penalties. However, penalties shall accrue as provided in the preceding
14 Paragraph regardless of whether the Trustees have notified Defendant of a
15 violation.

16 c. All payments to the Trustees under this Paragraph will be
17 deposited with the Registry of the Court by EFT if the Registry of the Court
18 accepts payment in that form, and if not, by certified check. This payment will be
19 deposited in the Lower Duwamish Waterway Account. At the time of each
20 payment, Defendant will send notice that payment has been made to the Trustees
21 and DOJ in accordance with Section XXIII (Notices and Submissions). This
22 notice will reference Lower Duwamish Waterway NRDA, DOJ Case Number 90-
23 11-3-07227/1, and the civil action number.

24 d. All penalties accruing under this Section shall be due and
25 payable within 30 days of the Defendant's receipt from the Trustees of a demand
26 for payment of the penalties, unless Defendant invokes the Dispute Resolution
27 procedures under Section XIV (Dispute Resolution).

28

1 e. Defendant may dispute the Trustees' right to the penalties
2 identified under Subparagraph a above by invoking the procedures of Section
3 XIV (Dispute Resolution).

4 The payment of penalties shall not alter in any way Defendant's obligation
5 to complete the performance of the Work required under this Consent Decree.

6 40. Penalties shall continue to accrue as provided in Paragraph 39(b)
7 during any dispute resolution period, but need not be paid until the following:

8 a. If the dispute is resolved by agreement or by a decision of the
9 Trustees that is not appealed to this Court, accrued penalties determined to be
10 owing shall be paid to the Trustees within 15 days of the agreement or the receipt
11 of the Trustees' decision or order;

12 b. If the dispute is appealed to this Court and the Trustees prevail
13 in whole or in part, Defendant shall pay all accrued penalties determined by the
14 Court to be owed to the Trustees within 60 days of receipt of the Court's decision
15 or order, except as provided in Subparagraph c below;

16 c. If the District Court's decision is appealed by any Party,
17 Defendant shall pay all accrued penalties determined by the District Court to be
18 owing to the Trustees into an interest-bearing escrow account within 60 days of
19 receipt of the Court's decision or order. Penalties shall be paid into this account
20 as they continue to accrue, at least every 60 days. Within 15 days of receipt of
21 the final appellate court decision, the escrow agent shall pay the balance of the
22 account to the Trustees or to Defendant to the extent that they prevail.

23 41. If Defendant fails to pay stipulated penalties when due, the Trustees
24 may institute proceedings to collect the penalties, as well as interest. Defendant
25 shall pay Interest on the unpaid balance, which shall begin to accrue on the date
26 of demand made pursuant to Paragraph 39(d).

1 42. If the Trustees bring a motion or a separate action in court to enforce
2 this Decree and prevail, the Trustees shall be entitled to recover from the
3 Defendant their reasonable costs of such motion or action, including but not
4 limited to costs of attorney time.

5 43. Payments made under this Section are in addition to any other
6 remedies or sanctions available to Plaintiffs by virtue of Defendant’s failure to
7 comply with the requirements of this Decree.

8 44. Notwithstanding any other provision of this Section, Plaintiffs may,
9 in their unreviewable discretion, waive payment of any portion of the stipulated
10 penalties that have accrued pursuant to this Decree. Payment of stipulated
11 penalties does not excuse Defendant from payment as required by Sections VII,
12 X, XI, or XII or from performance of any other requirement of this Consent
13 Decree.

14 45. The Trustees may use sums paid as stipulated penalties under
15 Paragraph 39 to pay unreimbursed damage assessment costs and to fund or
16 contribute to additional actions to restore Lower Duwamish Waterway natural
17 resources.

18 XVI. FORCE MAJEURE

19 46. “Force majeure,” for purposes of this Consent Decree, is defined as
20 any event arising from causes beyond the control of Defendant (including
21 Defendant’s contractors and sub-contractors, and any other entity controlled by
22 Defendant) that delays or prevents the performance of any obligation under this
23 Consent Decree despite Defendant’s best efforts to fulfill the obligation. The
24 requirement that Defendant exercises “best efforts to fulfill the obligation”
25 includes using best efforts to anticipate any potential force majeure event and use
26 best efforts to address the effects of any potential force majeure event (1) as it is
27 occurring and (2) following the potential force majeure event, such that the delay
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1 is minimized to the greatest extent possible. “Force majeure” does not include
2 financial inability to fulfill the obligation. The requirement that Defendant
3 exercises “best efforts to fulfill the obligation” also includes, where necessary, the
4 filing of legal actions to compel contract performance in accordance with the
5 design and schedule approved by the Trustees herein.

6 47. a. If any event occurs or has occurred that may delay the
7 performance of any obligation under this Consent Decree, whether or not caused
8 by a force majeure event, Defendant shall notify the Trustees within 14 days of
9 when Defendant first knew that the event might cause a delay. Within 30 days
10 thereafter, Defendant shall provide a written explanation and description of the
11 reasons for the delay; the anticipated duration of the delay; all actions taken or to
12 be taken to prevent or minimize the delay; a schedule for implementation of any
13 measures to be taken to prevent or mitigate the delay or the effect of the delay;
14 and the rationale for attributing such delay to a force majeure event (if Defendant
15 intends to assert such a claim). Defendant shall include with any notice all
16 available documentation supporting its claim that the delay was attributable to a
17 force majeure event. Failure to comply with the above requirements will preclude
18 Defendant from asserting any claim of force majeure for that event.

19 b. If the Trustees agree that the delay or anticipated delay is
20 attributable to a force majeure event, the time for performance of the obligations
21 under this Consent Decree that are affected by the force majeure event will be
22 extended by the Trustees for such time as is necessary. An extension of the time
23 for performance of the obligations affected by the force majeure event shall not,
24 of itself, extend the time for performance of any other obligation. If the Trustees
25 do not agree that the delay or anticipated delay has been or will be caused by a
26 force majeure event, the Trustees will notify Defendant in writing of their
27 decision.
28

1 c. If Defendant elects to invoke the dispute resolution procedures
2 set forth in Section XIV, above, regarding a claimed force majeure event it shall
3 do so no later than 30 days after receipt of the Trustees' notice of disagreement.
4 In any such proceeding Defendant shall have the burden of demonstrating by a
5 preponderance of the evidence that the delay or anticipated delay has been or will
6 likely be caused by a force majeure event, that the duration of the delay or the
7 extension sought was or will be warranted under the circumstances, that
8 Defendant exercised best efforts to fulfill the obligation in question, that best
9 efforts were exercised to avoid and mitigate the effects of the delay, and that
10 Defendant complied with the requirements of this Paragraph. If Defendant
11 carries this burden, the delay at issue shall be deemed not to be a violation by
12 Defendant of the affected obligation of this Consent Decree.

13 XVII. INDEMNIFICATION; INSURANCE

14 48. a. Plaintiffs do not assume any liability by entering into this
15 Consent Decree. Defendant shall indemnify and hold harmless each of the
16 Plaintiffs and/or their agents, employees and representatives from any and all
17 damage claims or causes of action arising from negligent or other wrongful acts
18 or omissions of Defendant and/or its officers, employees, agents, contractors,
19 subcontractors, representatives and any persons acting on its behalf or under its
20 control in carrying out activities pursuant to this Consent Decree. Further,
21 Defendant agrees to pay the Plaintiffs all reasonable costs they incur, including
22 but not limited to attorneys fees and other expenses of litigation and settlement,
23 arising from or on account of claims made against the Plaintiffs based on
24 negligent or other wrongful acts or omissions of Defendant or its officers,
25 employees, agents, contractors, subcontractors, representatives and any persons
26 acting on its behalf or under its control, in carrying out activities pursuant to this
27 Consent Decree. None of the Plaintiffs shall be held out as a party to any contract
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1 entered into by or on behalf of Defendant in carrying out activities pursuant to
2 this Consent Decree. Neither Defendant nor any contractor or representative of
3 Defendant shall be considered an agent of any Plaintiff, and Defendant shall
4 require any contractor hereafter retained by Defendant who performs work for
5 Defendant in carrying out activities pursuant to this Consent Decree to
6 affirmatively acknowledge that it is not acting as an agent of any Plaintiff.

7 b. Plaintiffs shall give Defendant written notice of any claim for
8 which one or more Plaintiff plans to seek indemnification pursuant to Paragraph
9 48(a), and shall consult with Defendant (including, but not limited to, responding
10 to Defendant's reasonable requests for information regarding any proposed
11 settlement of that claim) prior to settling such claim.

12 49. Defendant waives all claims against Plaintiffs for damages or
13 reimbursement or for set-off of any payments made or to be made to Plaintiffs,
14 arising from or on account of any contract, agreement, or arrangement between
15 Defendant and any person for performance of activities pursuant to this Consent
16 Decree, including, but not limited to, claims on account of construction delays.
17 In addition, Defendant shall indemnify and hold harmless Plaintiffs with respect
18 to any and all claims for damages or reimbursement arising from or on account of
19 any contract, agreement, or arrangement between any Defendant and any person
20 for performance of activities pursuant to this Consent Decree, including, but not
21 limited to, claims on account of construction delays.

22 50. No later than 15 days before commencing any work on the Project
23 Site, Defendant shall cause to be maintained comprehensive general liability
24 insurance and automobile liability insurance with limits of \$10,000,000 (ten
25 million dollars), combined single limit. The Trustees shall be named additional
26 insureds on any such policies with respect to all liability arising out of the
27 activities performed by or on behalf of Defendant pursuant to this Consent
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1 Decree. In addition, for the duration of this Consent Decree Defendant shall
2 satisfy, or shall ensure that their contractors or subcontractors satisfy, all
3 applicable laws and regulations regarding the provision of worker's compensation
4 insurance for all persons performing any work involved in implementing this
5 Consent Decree. No later than 15 days before commencing any work involved in
6 implementing this Consent Decree, Defendant shall provide to the Trustees
7 certificates of such insurance. Upon request, the United States Department of
8 Justice may examine any such insurance policies at Defendant's corporate
9 headquarters in Chicago, Illinois, for the limited purpose of verifying that such
10 insurance policies provide the coverage required by this Consent Decree. The
11 Department of Justice will not copy the insurance policies during its review;
12 however, in the event of a dispute regarding the adequacy of such insurance
13 policies, Defendant will provide a confidential copy of the disputed policies to
14 the Court and to the Department of Justice. Following the resolution of any such
15 dispute, the copies provided will be destroyed or returned to Defendant.
16 Defendant shall resubmit such certificates each year on the anniversary of the
17 effective date of this Consent Decree. If Defendant demonstrates by evidence
18 satisfactory to the Trustees that any contractor or subcontractor maintains
19 insurance equivalent to that described above, or insurance covering the same risks
20 but in a lesser amount, then, with respect to that contractor or subcontractor,
21 Defendant need provide only that portion of the insurance described above that is
22 not maintained by the contractor or subcontractor.

23 XVIII. COVENANT NOT TO SUE BY PLAINTIFFS

24 51. Except as specifically provided in Section XIX (Reservations of
25 Rights) below, Plaintiffs covenant not to sue or to take administrative action
26 against Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a);
27 Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. §
28

1 1321; or Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §
2 2702(a), to recover Covered Natural Resource Damages. This covenant not to
3 sue will take effect upon Defendant's complete payment of costs pursuant to
4 Section X (Reimbursement of Restoration Oversight Costs), Section XI
5 (Reimbursement of Past Costs), and Section XII (Fund for Permanent
6 Stewardship of Project Site) and continue in effect conditioned upon the
7 satisfactory performance by Defendant of its obligations under this Consent
8 Decree. This covenant not to sue extends only to Defendant and its heirs,
9 successors and assigns, and does not extend to any other person.

10 XIX. RESERVATIONS OF RIGHTS

11 52. Plaintiffs reserve, and this Consent Decree is without prejudice to,
12 all rights against Defendant with respect to all matters not expressly included
13 within the Covenant Not to Sue by Plaintiffs in Paragraph 51. Notwithstanding
14 any other provision of this Consent Decree, the Plaintiffs reserve all rights against
15 Defendant with respect to:

- 16 a. liability for costs of response incurred or to be incurred by
17 Plaintiffs under any federal or State statute;
- 18 b. liability for damages to natural resources (including
19 assessment costs) as defined 42 U.S.C. §§ 9601(6 & 16) that are not expressly
20 included within the Covenant Not to Sue by Plaintiffs in Paragraph 51;
- 21 c. liability for damages to natural resources (including
22 assessment costs) as defined 42 U.S.C. §§ 9601(6 & 16) within the Lower
23 Duwamish Waterway or Elliott Bay resulting from new releases of Waste
24 Material from Defendant's operations after the effective date of this Consent
25 Decree, or resulting from the Defendant's transportation, treatment, storage, or
26 disposal, or the arrangement for the transportation, treatment, storage, or disposal

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1 of Waste Material at or in connection with the Site, after signature of this Consent
2 Decree;

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

5 e. liability for costs incurred or to be incurred by the Agency for
6 Toxic Substances and Disease Registry in or regarding the Lower Duwamish
7 Waterway or Elliott Bay;

8 f. additional claims for Covered Natural Resource Damages if
9 conditions, factors or information in the Lower Duwamish Waterway or Elliott
10 Bay, not known to the Trustees as of the effective date, are discovered that,
11 together with any other relevant information, indicate that there is a threat to the
12 environment, or injury to, destruction of, or loss of natural resources of a type
13 unknown, or of a magnitude significantly greater than was known, at the time of
14 entry of this Consent Decree, which is attributable to the Defendant (for purposes
15 of this Subparagraph, information known to the Trustees shall consist of any
16 information in the files of, or otherwise in the possession of, any one of the
17 individual Trustees, or their contractors or consultants who worked on the
18 Trustees' natural resource damages assessment and liability allocation projects);

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

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

22 XX. COVENANT NOT TO SUE BY DEFENDANT

23 53. Defendant covenants not to sue and agrees not to assert any claims or
24 causes of action against the United States, the State, the Suquamish Tribe, and the
25 Muckleshoot Indian Tribe, or their contractors or employees, relating to Covered
26 Natural Resource Damages. Defendant reserves, and this Consent Decree is
27 without prejudice to, all rights with respect to all matters not expressly included
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1 within this Covenant Not to Sue, including all rights with respect to all matters
2 reserved in Section XIX.

3 XXI. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

4 54. Nothing in this Consent Decree shall be construed to create any
5 rights in, or grant any cause of action to, any person not a Party to this Consent
6 Decree. The preceding sentence shall not be construed to waive or nullify any
7 rights that any person not a signatory to this decree may have under applicable
8 law. Each of the Parties expressly reserves any and all rights (including, but not
9 limited to, any right to contribution), defenses, claims, demands, and causes of
10 action they each may have with respect to any matter, transaction, or occurrence
11 relating in any way to the Lower Duwamish Waterway against any person not a
12 Party hereto. Nothing in this Consent Decree diminishes the right of the United
13 States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-
14 (3), to pursue any such persons to obtain additional relief (including response
15 action, response costs, and natural resource damages) and to enter into
16 settlements that give rise to contribution protection pursuant to Section 113(f)(2).

17 55. The Parties agree, and by entering this Consent Decree this Court
18 finds, that this settlement constitutes a judicially-approved settlement for
19 purposes of Section 113(f)(2), and that Defendant is entitled, as of the effective
20 date of this Consent Decree, to protection from contribution actions or claims as
21 provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW
22 70.105D.040(4)(d), or as may be otherwise provided by law, for Covered Natural
23 Resource Damages; provided, however, that if the Plaintiffs exercise their rights
24 under the reservations in Section XIX, other than in Paragraphs 52(g) (criminal
25 liability) and 52(h) (failure to satisfy a requirement of this Consent Decree), the
26 contribution protection afforded by this Consent Decree will no longer include
27 those matters that are within the scope of the exercised reservation.

28

1 56. Defendant agrees that it will notify the Trustees and the United
2 States in writing no later than 60 days before bringing a suit or claim for
3 contribution for Covered Natural Resource Damages. Defendant also will notify
4 the Trustees of any settlement of its claims (regardless of whether the claim is
5 filed or unfiled) for contribution for Covered Natural Resource Damages.
6 Defendant also agrees that it will notify the Trustees and the United States in
7 writing within 10 days of service of a complaint or claim upon Defendant relating
8 to a suit or claim for contribution for Covered Natural Resource Damages. In
9 addition, Defendant will notify the Trustees and the United States within 10 days
10 of service or receipt of any Motion for Summary Judgment and within 10 days of
11 receipt of any order from a court setting a case for trial for matters related to this
12 Decree.

13 57. In any subsequent administrative or judicial proceeding initiated by
14 the Plaintiffs for injunctive relief, recovery of response costs, or other appropriate
15 relief other than Covered Natural Resource Damages, Defendant shall not assert,
16 nor may it maintain, any defense or claim based upon the principles of waiver, res
17 judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses
18 based upon any contention that the claims raised by the Plaintiffs in the
19 subsequent proceeding were or should have been brought in the instant case;
20 provided, however, that nothing in this Paragraph affects the enforceability of the
21 covenants not to sue set forth in Paragraphs 51 and 53.

22 XXII. RETENTION OF RECORDS

23 58. Until 10 years after the Defendant’s receipt of the Trustees’
24 notification pursuant to Paragraph 15, Defendant shall preserve and retain all
25 non-identical copies of records and documents (including records or documents
26 in electronic form) now in its possession or control or which come into its
27 possession or control that relate in any manner to its liability under CERCLA
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1 with respect to the Lower Duwamish Waterway. Defendant must also retain, and
2 instruct its contractors and agents to preserve, for the same period of time
3 specified above all non-identical copies of the last draft or final version of any
4 documents or records (including documents or records in electronic form) now in
5 its possession or control or which come into its possession or control that relate in
6 any manner to the performance of the Project, provided, however, that Defendant
7 (and its contractors and agents) must retain, in addition, copies of all data
8 generated during the performance of the Work and not contained in the
9 aforementioned documents required to be retained. Each of the above record
10 retention requirements shall apply regardless of any corporate retention policy to
11 the contrary.

12 59. At the conclusion of this document retention period, Defendant shall
13 notify the Trustees at least 90 days prior to the destruction of any such records or
14 documents, and, upon written request by the Trustees, Defendant shall deliver any
15 such non-privileged records or documents to the Trustees. Defendant may assert
16 that certain documents, records and other information are privileged under the
17 attorney-client privilege or any other privilege recognized by federal law. If
18 Defendant asserts such a privilege, it shall provide the Plaintiffs with the
19 following: (1) the title of the document, record, or information; (2) the date of the
20 document, record, or information; (3) the name and title of the author of the
21 document, record, or information; (4) the name and title of each addressee and
22 recipient; (5) a description of the subject of the document, record, or information;
23 and (6) the privilege asserted by Defendant. However, no documents, reports or
24 other information created or generated pursuant to the requirements of the
25 Consent Decree shall be withheld on the grounds that they are privileged.

26 60. Defendant hereby certifies individually that, to the best of its
27 knowledge and belief, after a reasonable inquiry that fully complies with the
28

1 Federal Rules of Civil Procedure, it has not altered, mutilated, discarded,
2 destroyed or otherwise disposed of any records, documents or other information
3 (other than identical copies) relating to its potential liability regarding the Site
4 since notification of potential liability by any Trustee.

5 XXIII. NOTICES AND SUBMISSIONS

6 61. Whenever notice is required to be given or a document is required to
7 be sent by one Party to another under the terms of this Decree, it will be directed
8 to the individuals at the addresses specified below, unless those individuals or
9 their successors give notice of a change to the other Parties in writing. Written
10 notice as specified constitutes complete satisfaction of any written notice
11 requirement of the Decree for Plaintiffs and Defendant

12 As to the United States and as to DOJ:

13 Chief, Environmental Enforcement Section
14 Environment and Natural Resources Division
15 U.S. Department of Justice
16 P.O. Box 7611
17 Washington, D.C. 20044-7611
18 (DJ #90-11-3-07227/1)

19 Michael J. Zevenbergen
20 U.S. Department of Justice
21 c/o NOAA/Damage Assessment
22 7600 Sand Point Way, NE
23 Seattle, WA 98115

24 As to NOAA:

25 Laurie Lee
26 NOAA Office of General Counsel
27 501 W. Ocean Blvd., Suite 4470
28 Long Beach, CA. 90802

As to the United States Department of the Interior:

Barry Stein
U.S. Department of the Interior
Office of the Solicitor
805 S.W. Broadway, Suite 600
Portland, OR 97205

1 Jeff Krausmann
2 U.S. Fish & Wildlife Service
3 510 Desmond Dr. SE, Suite 102
4 Lacey, WA 98503-1263

5 As to the State:

6 Craig Thompson
7 Toxics Cleanup Program
8 State of Washington
9 P.O. Box 47600
10 Olympia, WA 98504-7600

11 As to the Suquamish Tribe:

12 Melody Allen
13 Suquamish Tribe
14 Legal Department
15 P.O. Box 498
16 Suquamish, WA 98392-0498

17 As to the Muckleshoot Indian Tribe:

18 Mr. Rob Otsea
19 Office of the Tribal Attorney
20 Muckleshoot Indian Tribe
21 39015 172nd Avenue S.E.
22 Auburn, WA 98002

23 As to Boeing:

24 Steven E. Rusak
25 The Boeing Company
26 MC 7A-XP
27 P.O. Box 3707
28 Seattle, WA 98124-2207

Mark W. Schneider
Perkins Coie LLP
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099

XXIV. EFFECTIVE DATE

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

1 XXV. RETENTION OF JURISDICTION

2 63. This Court retains jurisdiction over both the subject matter of this
3 Consent Decree and the Parties for the duration of the performance of the terms
4 and provisions of this Consent Decree for the purpose of enabling any of the
5 Parties to apply to the Court at any time for such further order, direction, and
6 relief as may be necessary or appropriate for the construction or modification of
7 this Consent Decree, or to effectuate or enforce compliance with its terms, or to
8 resolve disputes in accordance with Section XIV (Dispute Resolution) hereof.

9 XXVI. INTEGRATION/APPENDICES

10 64. This Decree and its appendices constitute the final, complete, and
11 exclusive agreement and understanding with respect to the settlement embodied
12 in this Decree. The Parties acknowledge that there are no representations,
13 agreements, or understandings relating to the settlement other than those
14 expressly contained in this Decree. The terms “Consent Decree” and “Decree” as
15 used herein include the appendices to this Consent Decree, unless expressly
16 indicated to the contrary. The following appendices are attached to and
17 incorporated into this Consent Decree:

- 18 Appendix A Boeing Habitat Project Scope of Work
- 19 Appendix B Project Site deed restrictions

20 XXVII. MODIFICATION

21 65. No material modifications shall be made to any requirement under
22 this Consent Decree without written notification to and written approval of the
23 United States Department of Justice and the Trustees, Defendant and the Court.
24 Modifications to this Consent Decree exclusive of the appendices incorporated
25 within that do not materially alter the terms of this Consent Decree may be made
26 by written agreement between the United States Department of Justice, the
27 Trustees and Defendant. Modifications to any of the appendices to this Consent
28

1 Decree that do not materially alter any of the terms of this Consent Decree may be
2 made by written agreement between the Trustees and Defendant.

3 XXVIII. ENFORCEMENT

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

8 XXIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

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

15 68. If for any reason this Court does not approve this Decree in the form
16 presented, this Decree may be voided at the sole discretion of any Party, and the
17 terms of the agreement may not be used as evidence in any litigation among the
18 Parties.

19 XXX. TERMINATION

20 69. When all actions required under Section VII have been taken and all
21 payments required under Sections X, XI, and XII have been made, the parties may
22 move to partially terminate this Consent Decree. Notwithstanding the previous
23 sentence, the following provisions of this Decree shall survive any motion for
24 termination: Paragraphs 20 and 21 of Section VII; Section VIII (“Access to
25 Information and Project Site”); Section XIV (“Dispute Resolution”); Section
26 XVIII (“Covenant Not to Sue by Plaintiffs”); Section XIX (“Reservations of
27 Rights”); Section XX (“Covenant Not To Sue by Defendant”), Section XXI
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1 (“Effect of Settlement; Contribution Protection”); and Section XXV (“Retention
2 of Jurisdiction”).

3 XXXI. SIGNATORIES/SERVICE

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

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

13 72. Defendant will identify on the attached signature page the name and
14 address of an agent who is authorized to accept service of process by mail on
15 behalf of it with respect to all matters relating to this Decree. Defendant agrees to
16 accept service in that manner and to waive the formal service requirements set
17 forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local
18 rules of this Court, including but not limited to service of a summons. Defendant
19 need not file an answer to the complaint in this action unless or until the Court
20 expressly declines to enter this Decree.

21 XXXII. FINAL JUDGMENT

22 73. Upon approval and entry of this Consent Decree by the Court, this
23 Consent Decree shall constitute a final judgment between and among the United
24 States, the State, the Suquamish Tribe, the Muckleshoot Indian Tribe, and
25 Defendant. The Court finds that there is no just reason for delay and therefore
26 enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

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SO ORDERED THIS _____ DAY OF _____, _____.

United States District Judge

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Signature Page for Consent Decree regarding the Lower Duwamish Waterway

FOR THE UNITED STATES OF AMERICA:

Date: 3/2/10

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 5/4/2010

MICHAEL J. ZEVENBERGEN
Senior Counsel
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
c/o NOAA Damage Assessment
7600 Sand Point Way, NE
Seattle, Washington 98115

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Signature Page for Consent Decree regarding the Lower Duwamish Waterway

FOR THE BOEING COMPANY:

Date: 15 December 2009

STEVEN SHETAG ✓
Director of Enterprise Remediation
The Boeing Company

Date: 16 December 2009

STEVEN E. RUSAK ✓
Counsel for Environment, Health and Safety
Office of the General Counsel
The Boeing Company

Date: 16 December 2009

MARK W. SCHNEIDER
Perkins Coie LLP
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099

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Signature Page for Consent Decree regarding the Lower Duwamish Waterway

FOR THE STATE OF WASHINGTON:

Date: 1-19-10

Ted Sturdevant
Director
Department of Ecology

Date: 2/01/10

Nels Johnson
Assistant Attorney General
State of Washington

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Signature Page for Consent Decree regarding the Lower Duwamish Waterway

FOR THE SUQUAMISH TRIBE:

Date: 1/11/10

Leonard Forsman
Chairman
Suquamish Tribe
Post Office Box 498
Suquamish, Washington 98392

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Signature Page for Consent Decree regarding the Lower Duwamish Waterway

FOR THE MUCKLESHOOT INDIAN TRIBE:

Date: 1-22-10

Charlotte Williams
Chairperson
Muckleshoot Indian Tribe
39015 172nd Ave. S.E.
Auburn, WA 98092-9763