



THEA FOSS AND WHEELER-OSGOOD WATERWAYS REMEDIATION PROJECT

INSTITUTIONAL CONTROLS PLAN

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Prepared for:

U.S. ENVIRONMENTAL PROTECTION AGENCY

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CITY OF TACOMA

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WHEELER-OSGOOD WATERWAYS REMEDIATION PROJECT**

TABLE OF CONTENTS

	<u>PAGE</u>
SECTION I INTRODUCTION	1
SECTION II ELEMENTS OF THE CITY'S PLAN	2
A. Protection Through Site Use Restrictions	2
A.1. Settling Defendants	3
A.2. Non-Settling Parties	4
A.2.1 Foss Waterway Development Authority	4
A.2.2 Foss Landing LLC	4
A.3. Washington State Department of Transportation	5
A.4. Washington State Department of Natural Resources	5
A.5 Simpson/St. Paul Disposal Facility	6
A.6 Other Properties with Habitat Mitigation Improvements	8
A.6.1 Puyallup River Side Channel	8
A.6.2 Hylebos Creek Mitigation Site	9
A.6.3 Foss Waterway Habitat Enhancement Areas	9
A.7 General Public	10
B. Protection Through Notice To Successors-In-Title	10
C. Notice To Owner Settling Defendants	10
D. Future Development	10
D.1. Future Building, Shoreline and Wetland Permits	11
D.1.1. Informational Handout	11

D.1.2. Permitting	11
D.1.3. Shoreline Master Program – Administration	13
D.1.4. Piling Installation and Removal	14
D.1.5. Dredging or Excavation	15
D.2 Development at the CDF	15
E. Navigational Maps, Anchorage Restrictions and Signage	16
E.1 Navigational Chart Update	16
E.2 Regulated Navigation Area – Anchorage Restrictions	16
F. Signage	17
F.1 Waterway Signs for Boaters	17
F.2 Upland Signs for the Public	17
G. Coordination with Tacoma Police Department Marine Unit	18
H. Shellfish Harvesting	18
I. Schedule	18

EXHIBITS

Exhibit A	Location of “Owner Settling Defendant” and “Non-Settling Parties” Properties
Exhibit B	Model Restrictive Covenant
Exhibit C	DNR Institutional Controls Plan
Exhibit D	Utilities’ Institutional Controls Plan
Exhibit E	Simpson Easement (Paragraphs 13 through 19)
Exhibit F	Schedule for Implementing ICP

CITY OF TACOMA INSTITUTIONAL CONTROLS PLAN FOR THE THEA FOSS AND WHEELER-OSGOOD WATERWAYS REMEDIATION PROJECT

I. INTRODUCTION

The City of Tacoma (“City”) has completed remedial actions within the Thea Foss and Wheeler-Osgood Waterways (“Waterways”), beginning at the mouth of the Thea Foss Waterway to a point just north of the State Route 509 “cable stay” bridge, known as Waterway Station 70+10.¹ This Institutional Controls Plan (“Plan”) is submitted in accordance with Section IX of the City’s Consent Decree with the United States which was entered by the federal District Court for the Western District of Washington on May 9, 2003, under the case title *United States v. Atlantic Richfield Company, et al.*, Civil Action No. CO3-5117 RJB (“Consent Decree”). The Consent Decree was negotiated and entered pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §9601 et seq.

At the direction of the Environmental Protection Agency (“EPA”), the City has coordinated the development of this Plan with Puget Sound Energy, Advance Ross Sub Company, and PacifiCorp (hereinafter “the Utilities”). The Utilities completed remedial actions at the head of the Waterway south of Waterway Station 70+10 under a separate consent decree with the United States. The City also coordinated the development of this Plan with the Washington State Department of Natural Resources (“DNR”), which is responsible for managing state-owned aquatic lands within the Thea Foss Waterway under Revised Code of Washington, Title 79. DNR executed a separate consent decree with the United States to resolve its liability for sediment contamination in the Thea Foss Waterway.

In accordance with Section IX of the Consent Decree, the objective of this Plan is to ensure that contamination capped in the Waterways and in the Confined Aquatic Disposal Facility within the St. Paul Waterway, and contamination which is otherwise left in place in the Waterways remains contained and/or undisturbed for the purpose of:

¹ The area of the Thea Foss and Wheeler-Osgood Waterways where the City completed its sediment cleanup work under its Consent Decree with the United States is further delineated by separate “sub” work areas known as Remedial Action Areas 1 – 22. The Utilities completed sediment cleanup actions south of Waterway Station 70+10, in Remedial Areas 23 and 24.

- i) reducing the potential exposure of marine organisms to contaminated sediments disposed of and confined in aquatic disposal sites or confined by capping; and
- ii) reducing the potential exposure of marine organisms to contaminated sediments left in place in the Thea Foss and Wheeler-Osgood Waterways.

EPA has defined institutional controls as “non-engineered instruments, such as administrative and/or legal controls, that help minimize the potential for human exposure to contamination and/or protect the remedy by limiting land and/or resource use (e.g., easement, fish advisory, local permit).”²

The effectiveness of the City’s Plan is dependent upon a variety of controls. Taken together, these controls will help to ensure both the short and long-term protection of human health and the environment at the Waterways cleanup site, (“Site”). These controls include easements and restrictive covenants, building, shoreline and wetland permits, federal, state and local permits and public outreach tools, among others. The elements of the City’s Plan are discussed below.

II. ELEMENTS OF THE CITY’S PLAN

A. Protection Through Site Use Restrictions

Among other things, the effectiveness of the City’s Plan is dependent upon having adjacent property owners along the Waterways and others refrain from activities that may interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures and/or habitat improvements constructed pursuant to the Consent Decree. This group falls into seven categories: (1) parties who signed the Consent Decree as funding parties, (i.e., “Settling Defendants”); (2) parties that did not sign the Consent Decree, (i.e., “non-settling parties”); (3) Washington State Department of Transportation; (4) DNR; (5) Simpson Tacoma Land Company, Simpson Tacoma Kraft Company and Simpson Timber Company, (collectively “Simpson”); (6) owners of properties on which all or a portion of a habitat improvement was constructed; and (7) the general public who use and enjoy the Waterways.

² See, *Institutional Controls: A Citizen’s Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups*, OSWER 9355.0-98, EPA – 540-R-04-003, February 2005, at page 7.

A.1. Settling Defendants

The vast majority of properties with sediment caps located in or around the remedial action area are owned or controlled by parties who have signed the Consent Decree with the EPA and have therefore agreed under the Consent Decree to refrain from using their property in any manner that would interfere with or adversely affect the integrity or protectiveness of the remedial measures undertaken on such property. These parties are termed “Owner Settling Defendants” under the Consent Decree, and are identified in Appendix F to the Consent Decree. Exhibit A to this Plan shows the location of properties adjacent to the Thea Foss and Wheeler-Osgood Waterways owned by settling parties. Section IX, Paragraph 25.b of the Consent Decree requires that all Settling Defendants shall:

“...refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to this Consent Decree or the Utilities Consent Decree”

(See, Section IX, Paragraph 26.b of the Advance Ross Sub Company, PacifiCorp, and Puget Sound Energy Consent Decree for companion language.) This requirement is binding upon the Settling Defendants and their heirs, successors and assigns.

Pursuant to Section IX, Paragraph 25.c, EPA will request Owner Settling Defendants to execute and record in the Auditor’s Office of Pierce County, State of Washington, a restrictive covenant authorized by the Model Toxics Control Act (“MTCA”) at Chapter 70.105D RCW, and that complies with the form and content contained in WAC 173-340-440(9) for implementation of institutional controls that are required to ensure continued protection of human health and the environment or the integrity of the remedial actions and habitat mitigation work performed under the Consent Decree. (See, Section IX, Paragraph 27.c of the Utilities Consent Decree for companion language.) An example of the proposed model restrictive covenant which EPA will request Owner Settling Defendants to execute and record is attached as Exhibit B. The restrictive covenant will “run with the land” and become binding upon subsequent property owners. To assure the restrictive covenants executed and recorded by Owner Settling Defendants “run with the land”, they must (1) comply with RCW 64.04.010; (2) “touch and concern the land”; (3) express an intent for the restrictive covenant to run with the land and bind future owners; and (4) be recorded with the Pierce County Auditor’s Office. Restrictive covenants which are executed and recorded will burden only that portion of the property directly

adjacent to the remedial action or habitat area where the remedial action work could potentially be disturbed, and will not affect the entire parcel. Each restrictive covenant will include a legal description of the entire parcel, along with a map showing geographically the area of the parcel that is burdened by the restrictive covenant. The City will produce a map of its cleanup area within the Waterway area and propose uplands boundaries which will delineate where restrictive covenants should apply.

The City will coordinate with EPA in its effort to assure that restrictive covenants are executed and recorded by Owner Settling Defendants by providing information, when requested, to such defendants regarding the nature and scope of remedial actions and habitat mitigation work undertaken on their property; and by providing them maps depicting the location of remedial actions and habitat mitigation on their property for attachment to the restrictive covenant they execute and record.

A.2. Non-Settling Parties

As shown in Exhibit A, the only non-settling parties that the City is aware of that currently own property adjacent to the Waterways within the City's work area where contamination was either capped or left in place on a portion of the property are the Foss Waterway Development Authority and Foss Landing LLC.

A.2.1. Foss Waterway Development Authority

At EPA's request, and in accordance with Section IX, Paragraph 28.c, of the Consent Decree, the City will use best efforts to ensure that the FWDA execute and record in the County Auditor's Office of Pierce County a restrictive covenant on any portion of property it owns along the Waterways where remedial actions or habitat mitigation work has been completed by the City under its Consent Decree. Property currently owned by the FWDA along the Waterways where remedial actions and/or habitat mitigation work has been completed is described in Exhibit A.

A.2.2. Foss Landing LLC

At EPA's request, and in accordance with Section IX, Paragraph 28.c, of the Consent Decree, the City will use best efforts to ensure that Foss Landing execute and record in the County

Auditor's Office of Pierce County a restrictive covenant on that portion of the property it owns along the Waterways and within the City's work area where remedial actions or habitat mitigation work has been completed by the City. The Utilities also completed a portion of their sediment cleanup work on Foss Landing's property. If requested by EPA under the Utilities' Consent Decree, the Utilities may also be required to use best efforts to ensure that Foss Landing executes and records a restrictive covenant on that portion of Foss Landing's property within the Utilities' work area. The City will seek to coordinate with the Utilities in efforts to ensure Foss Landing executes and record restrictive covenants on their property.

A.3. Washington State Department of Transportation

The City will coordinate with the Washington State Department of Transportation ("WSDOT") to assure that maintenance of the Eleventh Street Bridge and the SR 509 Bridge³ are undertaken in a manner that protects the remedial actions within the Waterways. The City will provide WSDOT with a copy of this Plan.

A.4. Washington State Department of Natural Resources

The City and the Utilities (as performing parties in the Waterways) entered into a Settlement Agreement with DNR on August 21, 2003. Paragraph 5 of this Agreement includes the following language:

"a. Existing Leases: For State-owned aquatic lands already under lease at the time this Agreement is executed, DNR will use its best efforts to assist the Performing Parties in (i) securing access to those leased areas for the purpose of implementing work requirements under the Performing Parties' consent decrees and statements of work, and (ii) implementing institutional controls that the Performing Parties are required to implement under their consent decrees and statements of work.

b. New Leases: DNR shall provide the Performing Parties advance notice of DNR's intent to lease State-owned aquatic lands that lie within the Performing Parties' respective work areas and shall use its best efforts to provide such notice 30 days in advance of DNR issuing such a lease. Such notice will include a description of the area to be leased and the

³ The Eleventh Street Bridge is located within the City's work area. The SR 509 Bridge is not, but maintenance or other activities associated with the SR 509 Bridge could potentially affect remedial actions or habitat mitigation in the City's work area.

proposed activities for that lease area. For any lease DNR issues in the Performing Parties' work areas, DNR will ensure that the lessees take the property subject to the work requirements in the Performing Parties consent decrees, statements of work, and the institutional controls that may be required by EPA as part of the remedy. DNR will exercise utmost care in its leasing activities to minimize the risk that its lessees could cause or contribute to recontamination of the Waterways or failure of the EPA remedy."

In addition to DNR notifying the City (and the Utilities) of new state-owned aquatic land leases within the Waterways, Section 3, Paragraph (d) of DNR's Institutional Controls Plan states that DNR will also provide the City thirty (30) days notice of any proposed easements, rights-of-entry, or use authorizations within the City's work area.

Also, through their Foss Waterway aquatic lands leases, and through their consent decree with EPA, DNR is primarily responsible for ensuring that their tenants refrain from taking actions that will interfere with, or cause damage to cleanup actions undertaken on state-owned aquatic lands. The City will cooperate with EPA and DNR as necessary to provide information related to any required institutional controls that must be communicated to their lessees. This may include the posting of signs restricting anchoring in near shore capped areas as further discussed below.

DNR's Institutional Controls Plan is attached as Exhibit C. The Utilities' Institutional Controls Plan is attached as Exhibit D.

A.5. Simpson/St. Paul Disposal Facility

The City entered into a Memorandum of Agreement (MOA) with Simpson to construct the Confined Disposal Facility (CDF) within the St. Paul Waterway, which Simpson owns. The purpose of the CDF is to contain the majority of contaminated sediments dredged during the Thea Foss and Wheeler-Osgood Waterways Remediation Project ("the Remediation Project"). Pursuant to the CDF MOA, Simpson recorded an Easement for Access, Maintenance, and Inspection of Confined Disposal Facility and Habitat ("Easement") on August 30, 2003, with the Pierce County Auditor (Pierce County Auditor Recording No. 200308200715) which, among other things, grants the City access to the property and imposes certain future site use restrictions. These site use restrictions are found at Paragraphs 13 through 19 of the

Easement, which are attached as Exhibit E. Easement language applicable to development at the CDF site as well as the associated habitat areas is included below.

Paragraph 1.5 of the CDF MOA reads as follows:

“Recorded Restrictions. The Easement area in Attachment 7 includes: (a) a restriction for institutional controls, so that the use and development of the land on which the CDF is located is not inconsistent with the effectiveness and maintenance of the CDF; and (b) a restriction so that land on which the habitat mitigation/restoration portions of the Thea Foss Cleanup Project will be implemented will be reserved for habitat in perpetuity. Simpson will work with the City to respond to any reasonable request by EPA to modify recorded restrictions as may be necessary to protect human health and the environment.”

The easement mentioned in this paragraph, and included in the CDF MOA includes additional language that restricts future use of the affected properties to those activities that will not affect the effectiveness of the CDF, or the associated habitat areas. Specifically, Paragraphs 14 and 15 of the Easement read as follows:

14. Restrictions on the Use of the Easement Area. The Parties shall not construct facilities on the St. Paul CDF in a manner that causes a release of hazardous substances to the environment.

15. Excavation of CDF and Development in Swale Adjacent to Clarifiers. Grantors shall not excavate the CDF cover and/or cap below +12 MLLW without the consent of Grantee. “Excavation” for purposes of this Paragraph 15 does not include the installation of piles or utilities. As long as the clarifier tanks are located at the southeasterly end of the St. Paul CDF, Grantors shall not place buildings in the swale between the clarifiers and St. Paul CDF without the consent of Grantee, and Grantors shall consult with Grantee prior to placing any structures other than utilities in this swale. Nothing in this Paragraph 15 shall affect Grantors’ responsibility to obtain any City land use approvals or building permits that may be required.”

Two habitat mitigation areas were constructed by the City on Simpson’s property under the Consent Decree. These areas are known as the North Beach Habitat Area located at the peninsula between the St. Paul and Middle Waterways, and the Middle Waterway Tideflat

Habitat area. Institutional controls for these habitat mitigation areas are addressed under Paragraph 13 of the CDF MOA, which states as follows:

“13. Habitat in Perpetuity. The Habitat Improvements may not be disturbed in any manner that would impair or interfere with the integrity of the restored or enhanced habitat unless such disturbance is necessary to (i) maintain habitat value in perpetuity; (ii) reduce a threat to human health or the environment; or (iii) allow for facilities in St. Paul and Middle Waterways, including but not limited to piers or pier improvements, as may be approved by government agencies with jurisdiction. A map of these two areas along with project descriptions is included as Exhibit _____. Also, a portion of the North Beach Habitat area which extends into Commencement Bay is covered by DNR Aquatic Land Use Authorization No. 22-074977. This Use Authorization, which is recorded with the Pierce County Auditor’s Office, allows the City to use a portion of state-owned aquatic lands as necessary to implement the work required under the Consent Decree for a period of thirty (30) years. Section 6.3 of the Use Authorization restricts activities that will result in “mechanical or chemical disturbance of on-site habitat mitigation”, among other things.

In addition, DNR’s Institutional Controls Plan covers the North Beach Habitat area off the St. Paul Waterway. DNR has also removed the Middle Waterway Tideflat Habitat area from leasing. DNR’s efforts further reduce potential impacts to these habitat restoration areas.

A.6. Other Properties with Habitat Mitigation Improvements

A.6.1. Puyallup River Side Channel

The Puyallup River Side Channel habitat mitigation project (“PRSC”) was originally included within the Simpson CDF MOA, but was removed when Simpson conveyed the PRSC site in fee simple to the City in July 2004 for construction of the project. In November 2005, after the project was completed, the City conveyed ownership of the set back levee improvement to the Corps of Engineers (“Corps”) along with a perpetual easement so they can operate and maintain the levee. The remainder of the property on which the PRSC project is constructed is under the City’s ownership. The documents executed between the City and Corps are not intended to address controls to assure the PRSC maintains habitat value, nor are the property conveyance documents executed by the City and Simpson. The City’s Operations, Maintenance, and Monitoring Plan (“OMMP”) for the Foss Waterway Cleanup project requires

the City to monitor the PRSC site to ensure that the habitat area is achieving the performance objectives. The City will execute and record a restrictive covenant for the City-owned PRSC property. Public access to the PRSC project site from the upland side is restricted by a 6-foot high chain link fence with locking gates and a fire ditch, which will be further restricted by a vehicle barrier.

A.6.2. Hylebos Creek Mitigation Site

The majority of the Hylebos Creek Mitigation Site is constructed on land owned by the City. The City's OMMP for the Foss Waterway Cleanup project requires the City to monitor the Hylebos Creek site to ensure that the habitat area is achieving the performance objectives. The City will prepare a restrictive covenant for the City-owned portion of the project area and file it with the Pierce County Auditor's Office.

The remainder of the project was constructed on three residential properties pursuant to three Grant Deed of Conservation Easements ("Conservation Easements") which have been recorded under Pierce County Auditor Recording Nos. 200508101174 & 20060405746 – Bunker; 200508120617 – Rouse; and 200508180917 – Murphy. Each of the Conservation Easements is perpetual, and runs with the land to bind future successors. The Conservation Easements require, among other things, access for the City to construct, inspect, repair and monitor the habitat mitigation project, and access for EPA to oversee the City's work and monitor the habitat mitigation project. The property owners to whom the conservation easements apply are restricted from using their property in a manner inconsistent with the purpose of the easements.

A.6.3. Foss Waterway Habitat Enhancement Areas

Habitat enhancement work was completed at several areas along the Foss Waterway. Those areas are located near Foss Landing Marina (formerly Pick's Cove Marina) (Johnny's Dock Habitat Enhancement), the old steam plant property near the Foss Waterway Marina (Log Step Habitat Enhancement), under the SR 509 Bridge on the western shoreline of the head of the waterway (SR 509 Esplanade Riparian Habitat), and along the eastern shoreline of the head of the Foss Waterway (Head of the Thea Foss Shoreline Habitat). The City owns the esplanade property under the SR 509 Bridge and will record a restrictive covenant on that portion of the property where remedial actions and/or habitat mitigation work has been undertaken. Other

habitat areas located within the Foss Waterway will be protected by the Restrictive Covenants recorded for the property on which they are located, as required by the Consent Decree.

A.7 General Public

The City will place signs at marina and upland locations to notify the general public about the cleanup project and the need to avoid activities that could interfere with completed remedial actions and/or or habitat mitigation work, as further described in Section F below.

B. Protection Through Notice to Successors-In-Title

In accordance with Section V, Paragraph 9.a of the Consent Decree, the City recorded eleven EPA-approved Notice to Successors-in-Title with the Pierce County Auditor's Office relating to parcels it owns adjacent to the Foss Waterway. In the event any of these parcels are ever sold, subsequent owners will be on notice that Consent Decree restrictions apply to their use of the property. The City recorded these Notice to Successors-in-Title with the Pierce County Auditor's Office on June 26, 2003, under Pierce County Auditor Recording Nos. 200306260368 through 200306260378.

EPA also received confirmation that each Settling Defendant recorded Notice to Successors-in-Title with the Pierce County Auditor's Office.

C. Notice To Owner Settling Defendants

Within thirty (30) days of receiving EPA's Certification of Completion of Remedial Action Construction under Section XIV, Paragraph 50 of the Consent Decree, the City will send out a notice to those persons identified as Owner Settling Defendants in Appendix F to the Consent Decree to inform them that construction of the cleanup has been completed and to remind them to refrain from any actions that would adversely affect the protectiveness of the remedy. A copy of this Plan will be included in the notice.

D. Future Development

To the extent authorized by applicable federal, state and local law, the City will ensure that future development in and adjacent to areas of the Waterways where remedial actions and

habitat mitigation work has been completed is undertaken in a manner that protects the remedy, as described below in this Section.

D.1. Future Building, Shoreline and Wetland Permits

D.1.1. Informational Handout

Persons seeking a building, shoreline and/or wetlands permit for development adjacent to the Thea Foss and Wheeler-Osgood Waterways will receive a City-prepared handout that provides general information about remedial actions and habitat improvements constructed within these Waterways. The handout will also identify potential limitations and/or restrictions that could apply during their development project. The City will provide EPA, DNR and the Utilities a draft handout for review and comment within thirty (30) days of receiving EPA's Certification of Completion of Remedial Action Construction under Section XIV, Paragraph 50 of the Consent Decree.

D.1.2. Permitting

The City will ensure that institutional controls are factored into permit decisions by the Public Works Department Building and Land Use Services Division (BLUS). This division is responsible for all building and land use permitting and inspection within the City, including implementing the City's Critical Area Ordinance (Tacoma Municipal Code "TMC" 13.11) and Shoreline Master Program (TMC 13.10) along the Thea Foss and Wheeler-Osgood Waterways, among other places. BLUS is also responsible for ensuring that its permit decisions are in compliance with its Environmental Code, (TMC 13.12), which adopts by reference those sections of Chapter 197-11 WAC (the State Environmental Policy Act rules), which are listed at TMC 13.12.004.

BLUS, and the Environmental Services Science and Engineering Division which is responsible for monitoring the Thea Foss and Wheeler-Osgood Waterways Remediation Project for the City, will take the following steps to ensure that institutional controls are factored into the review and authorization of shoreline, building and wetland permits for development proposals on the Waterways:

D.1.2.1. Provide copies of the City's, the Utilities', and DNR's Institutional Control Plans to the City's Land Use Administrator, and the Division Manager of BLUS, along with a map showing the areas within the Thea Foss and Wheeler-Osgood Waterways where institutional controls apply.

D.1.2.2. Provide training on applicable institutional controls to staff within BLUS responsible for reviewing plans, inspecting projects, issuing permits and enforcing the Tacoma Municipal Code for all building, shoreline and critical areas development projects located along the Thea Foss and Wheeler-Osgood Waterways, and near habitat mitigation areas constructed under the Consent Decree. This training will help ensure that projects proposed along the Thea Foss and Wheeler-Osgood Waterways, or mitigation areas, or other areas where a portion of the Consent Decree remedy was constructed are "flagged" by BLUS staff for follow-up for consistency with this Plan.

D.1.2.3. Provide notice to EPA, DNR and Ecology, and other affected agencies with regulatory jurisdiction when permit applications are received by the City concerning development which may affect portions of the Thea Foss and Wheeler-Osgood Waterways where remedial actions and habitat mitigation work has been completed for comment and, when authorized by state or federal law, imposition of separate state or federal permit conditions, as further described in Section D.1.3. below.

D.1.2.4. Add a data layer to the City's govME website showing: (1) a color map of the Thea Foss and Wheeler-Osgood Waterways which depicts areas that have been dredged, dredged and capped, areas left for natural recovery, areas where no cleanup action was taken, and areas where habitat mitigation work has been undertaken; (2) a color map of the St. Paul Waterway showing the Confined Aquatic Disposal Facility and associated habitat mitigation areas including the North Beach Habitat area, the Middle Waterway Tideflat Habitat area, the Hylebos Creek Mitigation Site and the Puyallup River Side Channel; and (3) a folder group that can be accessed by site users on the map pages titled "Foss Superfund". This folder group will include a brief discussion about the Thea Foss and Wheeler-Osgood Waterways cleanup and the purpose of institutional controls, and provide the site user with an option to download the Institutional Controls Plan prepared by the City, the Utilities, and DNR, as well as all restrictive covenants filed on properties adjacent to the Waterways. The govME website provides on-line access to building, zoning, shoreline and

environmental permitting records and related information for City staff and the public. The govME website can be accessed at <http://govme.cityoftacoma.org>.

D.1.3. Shoreline Master Program – Administration

The City's Shoreline Master Program set forth in TMC 13.10, adopts by reference the sections of Chapter 173-27 WAC (Shoreline Management – Permits and Enforcement) listed in TMC 13.10.005⁴. TMC 13.10 authorizes the City to approve and monitor development and other activities within fourteen shoreline districts throughout the City. The Thea Foss and Wheeler-Osgood Waterways are part of the City's S-8 Shoreline District, which includes all of the Thea Foss Waterway, and Wheeler-Osgood Waterway between the west line of Dock Street, and east line of "D" Street, and 200 feet landward of the ordinary high water mark of the waterways.⁵ (See, TMC 13.10.110 B.) TMC 13.10.110 D., describes the uses and development activities subject to permitting by the City in the S-8 Shoreline District.

Certain shoreline uses or developments are exempt from shoreline permitting under WAC 173-27-040, including uses and developments valued at less than five thousand dollars⁶ and normal maintenance and repair of docks and structures, among others. When an exempt activity involves "in-water" work that is also subject to permitting by a federal agency, the City issues a letter of exemption and forwards a copy to the Department of Ecology ("Ecology") for coordination with the federal agency with jurisdiction to issue the permit for the activity. (See, WAC 173-27-050.)

When a shoreline permit application concerns development or other activity over which a federal, state, or other local agency exercises jurisdiction, the City is required to notify such agencies under WAC 173-27-110(6).⁷ These agencies may impose their own conditions on the development or activity using their separate permit or approval processes. The City conditions

⁴ The City also has a Critical Areas Preservation code at TMC 13.11. As of the date of this Plan (September 2006) TMC 13.11 applies to wetlands created to compensate when wetlands are lost due to development, but not to habitat mitigation projects which may involve creation of wetlands as part of a Superfund obligation to compensate for loss of aquatic habitat.

⁵ The Thea Foss and Wheeler-Osgood Waterways are shorelines of statewide significance under TMC 13.10.030.55.f, as are other marine shorelines within the City. This designation mandates a hierarchy of use preferences compared to other shorelines. These use preferences are set forth in RCW 90.58.020. See also, *Washington Real Property Desk Book*, Volume VI, Chapter 93, at page 93-14.

⁶ See, RCW 90.58.030 (e).

⁷ Notification is required within fourteen days after the City has determined the application is complete. WAC 173-27-110 (2).

permit decisions under its Shoreline Master Program upon the approvals of other federal, state or local agencies (or Indian Tribes) with jurisdiction over the activity. Ecology, EPA, the Army Corps of Engineers, Washington State Fish and Wildlife and DNR are among the federal and state agencies that would typically be given notice when the City receives an application for a shoreline permit along the Thea Foss and Wheeler-Osgood Waterways.⁸ Depending on the nature of the activity other agencies could be contacted as well. Ecology is the coordinating agency for the state with regard to permits issued by the Army Corps of Engineers. (See, WAC 173-27-050.) The City will also notify the Utilities when a shoreline permit application is received which concerns a proposed development or activity within their work area, and/or along the uplands adjacent to their work area. In an effort to process shoreline permit applications in a timely manner, agencies or persons notified of the permit application will be given a set time period within which to respond to the City.

D.1.4. Piling Installation and Removal

Piling installation is subject to regulation under the City's Shoreline Master Program. Permit applications for this type of work within those portions of the Waterways where remedial actions and/or habitat mitigation work has been completed will be forwarded to EPA and DNR (and the Utilities if proposed for their work area) for review. Applications for this type of work which are not proposed for completed remedial action areas within the Thea Foss Waterway, but which are proposed to be undertaken on state-owned aquatic lands will be forwarded to DNR for review. The City will condition its shoreline permit decision, or shoreline exemption decision for such work on the approval of EPA, DNR and any other federal, state, or local agency exercising jurisdiction over the proposed activity. The City will also notify the Utilities when a shoreline permit application for pile installation within or adjacent to their work area is received.

Driving piling in the waterways is considered "development" under WAC 173-27-030(6), and requires a shoreline permit. The City's Shoreline Management regulations require new piling in the waterways to be constructed of materials other than treated wood. (See, TMC 13.10.175.B.14.a.(9).) This is consistent with the City's understanding of DNR's approach, which is to prohibit the installation of creosote piling on state-owned aquatic lands, and require the use of steel or concrete piling instead.

⁸ Review under the City's Environmental Code (TMC 13.12) is required for shoreline development proposals which can add an additional layer of notice.

Piling removal work is not regulated under the City's Shoreline Master Program.⁹ However, such work is subject to a demolition permit issued by non-shoreline staff within BLUS. When applications for piling removal work within the Thea Foss Waterway are received, BLUS staff will refer to the govME website and require that piling located where a cap has been placed, or in close proximity to where a cap has been placed, be cut off at the mudline, rather than pulled.

D.1.5. Dredging or Excavating

Dredging or excavating in the Waterways may result in the impairment or interference with the sediment cap and habitat mix, thus interfering with the remedy by creating potential pathways for contaminants to rise to surface sediments. Therefore, in addition to any City shoreline permitting restrictions that may be placed on such activity, persons seeking to dredge or excavate within the Waterways in areas where a sediment cap or habitat mix has been placed will be required to satisfy conditions EPA may impose on such work. Such persons will also be required to obtain any applicable §404 permit approvals from the Army Corps of Engineers. When applicable, the §404 process will provide additional controls to prevent disturbance of the sediment cap and habitat mix areas. The City will forward any shoreline permit applications involving dredging and/or excavation to EPA, DNR and the Army Corps of Engineers for review. The City will also notify the Utilities when a shoreline permit application is received that concerns excavation and dredging within or adjacent to their work area.

D.2. Development at the CDF

As mentioned above, the MOA that the City has entered into with Simpson includes Easement language that restricts future use of the affected properties to those activities that will not reduce the effectiveness of the CDF or the associated habitat areas. The City will continue to coordinate with Simpson both through the MOA as well as through the building permit process to ensure the long-term integrity of the CDF and associated habitat areas.

⁹ The Washington Court has held that removal of a structure is not a "development" under RCW 90.58.030(3)(d) or "substantial development" under RCW 90.58.030(3)(e) of the Shoreline Management Act of 1971. (See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 815 (1992.))

E. Navigational Maps, Anchorage Restrictions and Signage

E.1. Navigational Chart Update

The City has contacted the National Oceanic and Atmospheric Administration (NOAA) – Marine Chart Division – to request that NOAA update its navigational charts to reflect changed bathymetric conditions within the Thea Foss Waterway and in the associated habitat areas. The City will continue to work with NOAA representatives as they undertake a major update of NOAA’s navigational charts for Commencement Bay, including the Thea Foss Waterway. Based on discussions with NOAA, updated navigational chart information is not expected to be compiled by NOAA field teams until spring 2007, and may not be reflected in NOAA’s updated chart for Commencement Bay for another twelve (12) months thereafter. In the interim, the City will request NOAA to update its navigational charts for Commencement Bay to reflect elevation changes in and around the North Beach Habitat Area.

The City, in coordination with the Utilities and DNR will request NOAA and the United States Coast Guard (“USCG”), Thirteenth District in Seattle, to publish chart updates in a Local Notice to Mariners. The City will also request that NOAA update its Coast Pilot publication with the same information.

E.2. Regulated Navigation Area – Anchorage Restrictions

Within sixty (60) days of receiving EPA’s Certification of Completion of Remedial Action Construction under Section XIV, Paragraph 50 of the Consent Decree, the City will, in coordination with the Utilities and DNR, place a request with the USCG for a rulemaking in accordance with 33 C.F.R. Part 165 to establish a Regulated Navigation Area (“RNA”) which prohibits anchorage (and other activities including barge “spudding” which could disturb sediment cap or habitat mix material) south of the Eleventh Street Bridge in those portions of the Thea Foss Waterway where remedial actions have been undertaken.¹⁰

¹⁰ Although the City is authorized to regulate some aspects of anchorage under RCW 35.22, it has neither the resources, nor authority under the Tacoma Municipal Code to undertake this activity. Tacoma Municipal Code, Chapter 4.22 does authorize the City to regulate the period of anchorage, but does not prohibit anchorage. If an RNA is established by the USCG, the City will propose an amendment to Chapter 4.22 referencing the RNA.

Once the RNA is published in the Federal Register, the City, in coordination with the Utilities and DNR, will request NOAA and the USCG -Thirteenth District in Seattle, to publish notice of the RNA in a Local Notice to Mariners. The City will also request NOAA to update its Coast Pilot publication with same information.

F. Signage

F.1. Waterway Signs for Boaters

In coordination with the Utilities and DNR, the City will place signs on marina docks throughout the Thea Foss Waterway to notify mariners about prohibited activities relating to vessel speed, anchorage or other activities which could disturb the protective cap or habitat mix placed in the Thea Foss and Wheeler-Osgood Waterways. DNR has committed to cooperating with the City and Utilities in the placement of signs in Section 3 d) iv)(1)(d)(2) of its Institutional Controls Plan, and in their proposed restrictive covenant. This requirement will apply to all new lessees, and to current lessees with lease re-openers for restrictive covenants.

The City and Utilities' model restrictive covenant proposed for the Waterways requires persons recording restrictive covenants on their property to allow placement and maintenance of visual aids on their property to the extent such placement does not unreasonably interfere with their use and enjoyment of their property. The City will maintain any signs it places. Signs will be designed in accordance with the standards set forth in TMC 13.10.175.A.4.

F.2. Upland Signs for the Public

In addition to the signs described above in Section F.1., the City, in coordination with the Utilities, will place signs on selected upland locations to inform the public about the Thea Foss and Wheeler-Osgood Waterways Project and the need to limit or avoid any disturbance of the intertidal and offshore areas of the Waterways which could interfere with completed remedial actions and/or habitat mitigation work. Signs will take the form of educational displays, prominently visible to the general public. The City will maintain these signs to ensure that they remain in place and readable during the monitoring period. The City will coordinate with the Utilities regarding the content and design of information signs to assure consistency. Signs will be designed in accordance with the standards set forth in TMC 13.10.175.A.4.

G. Coordination with Tacoma Police Department Marine Unit

The City will notify the Marine Unit of the Tacoma Police Department about the institutional controls related to vessel traffic in the Waterways and emphasize that enforcement of the vessel speed limit in the Waterways, which is currently 5 miles per hour under TMC 4.10.130, will help prevent “prop wash” which could disturb the integrity of the sediment cap.

H. Shellfish Harvesting

The Tacoma-Pierce County Health Department (TPCHD) is responsible for the placement and maintenance of multi-lingual signage in the waterway that warn the public about the danger of consuming shellfish harvested from this area. The City will continue coordination with TPCHD to ensure that these signs remain in place and are in good, readable condition as long as they are necessary. The City has received verbal approval from the TPCHD to include additional information on such signs prohibiting shell fishing techniques that will dig into, or disturb the sediment cap and/or habitat mix in the Waterways. As an alternative, the City may decide to develop a separate sign to be placed adjacent to the TPCHD sign which prohibits shell fishing techniques that will dig up, or stir the sediment cap and/or habitat mix in the Waterways. The City has contacted representatives of the Puyallup Tribe of Indians (“Puyallup Tribe”) about these restrictions and there is no indication the Puyallup Tribe has harvested shellfish in the Waterways in recent history, and, given the status of the Waterways, there is no indication the Puyallup Tribe will use the Waterways for such purposes in the future. However, the City will forward a copy of this Plan to the Puyallup Tribe with a request that if they decide to exercise a Treaty Right to harvest shellfish in the Waterways, that it contact the City in advance to discuss the activity.

I. SCHEDULE

The projected schedule for implementing the tasks identified in this Plan is attached as Exhibit F. This schedule is a projection, and actual completion dates could vary depending upon emergent circumstances, and/or the cooperation and availability of persons outside of the City’s Public Works Department – Science and Engineering Division to coordinate completion of the tasks identified in the schedule in Exhibit F.

Exhibit A

Location of “Owner Settling Defendant” and “Non-Settling Parties” Properties

Exhibit B

Model Restrictive Covenant

Exhibit B

The model Restrictive Covenant will be provided under separate cover when finalized by EPA.

Exhibit C

DNR Institutional Controls Plan

Exhibit C

The Department of Natural Resources' Institutional Controls Plan will be provided under separate cover upon completion.

Exhibit D

Utilities' Institutional Controls Plan

Exhibit D

The Utilities' Institutional Controls Plan will be provided under separate cover upon completion.

Exhibit E

Simpson Easement (Paragraphs 13 through 19)

EXHIBIT E



200308200715 38 PGS
08-20-2003 03:04pm \$56.00
PIERCE COUNTY, WASHINGTON

After Recording Return To:
Simpson Tacoma Land Company
Simpson Tacoma Kraft Company, LLC
Simpson Timber Company
1301 Fifth Avenue, Suite 2800
Seattle, Washington 98101
Attn: Joseph R. Breed

COPY

**EASEMENT FOR ACCESS, MAINTENANCE, AND
INSPECTION OF CONFINED DISPOSAL FACILITY AND HABITAT**

Grantors: Simpson Tacoma Land Company
Simpson Tacoma Kraft Company, LLC
Simpson Timber Company

Grantee: City of Tacoma

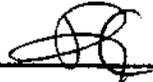
Legal Description:

Abbreviated Form: Portions of Section 33, Township 21 North, Range 3 East and Section 4, Township 20 North, Range 3 East of the Willamette Meridian and a portion of the Map of Tacoma Tidelands, as surveyed and platted by Tideland Appraisers for Pierce County, according to Plat filed September 14, 1985 (portions of Blocks 17, 18, and 19 of the Tacoma Tidelands), in the City of Tacoma, County of Pierce, State of Washington.

Additional legal on Exhibit A to document

Assessor's Tax Parcel ID#: R8950000480, R8950000490, R8950000528, R8950000530, R8950000531, R8950000563, R8950000564, R8950000565, R8950000566, R8950000404

EXCISE TAX EXEMPT DATE 8-20-03
Pierce County

By  Auth. Sig

PROPERTY RESTRICTIONS

13. Habitat in Perpetuity. The Habitat Improvements may not be disturbed in any manner that would impair or interfere with the integrity of the restored or enhanced habitat unless such disturbance is necessary to (i) maintain habitat value in perpetuity; (ii) reduce a threat to human health or the environment; or (iii) allow for facilities in St. Paul and Middle Waterways, including but not limited to piers or pier improvements, as may be approved by government agencies with jurisdiction.

14. Restrictions on the Use of the Easement Area. The Parties shall not construct facilities on the St. Paul CDF in a manner that causes a release of hazardous substances to the environment.

15. Excavation of CDF and Development in Swale Adjacent to Clarifiers. Grantors shall not excavate the CDF cover and/or cap below +12 MLLW without the consent of Grantee. "Excavation" for purposes of this Paragraph 15 does not include the installation of piles or utilities. As long as the clarifier tanks are located at the southeasterly end of the St. Paul CDF, Grantors shall not place buildings in the swale between the clarifiers and St. Paul CDF without the consent of Grantee, and Grantors shall consult with Grantee prior to placing any structures other than utilities in this swale. Nothing in this Paragraph 15 shall affect Grantors' responsibility to obtain any City land use approvals or building permits that may be required.

16. Groundwater. No groundwater may be taken for drinking water or domestic purposes from the Property.

17. Access. Grantors shall provide access to authorized representatives of EPA and the State of Washington, their heirs, successors, and assigns, to enter the Easement Area at reasonable times and in a reasonable manner, as provided above in Section 3 of this Agreement, for the sole purpose of overseeing and evaluating the remedial action and confirming the effectiveness of the remedy contained in the Thea Foss Cleanup Plan and the associated Habitat Improvements, including to take samples and to inspect the remedial action; provided that EPA and the State of Washington or their representatives shall restore the property to the condition it was in before such samples were taken and shall otherwise indemnify and defend the Grantors against any and all claims or causes of

action for death or injuries to persons, or for loss or damage to property arising **from** or on account of the negligent acts or omissions in such sampling inspections.

18. Advance Notice of Conveyance. The appropriate Grantor shall give thirty (30) days written notice to Grantee and EPA in advance of any Closing of a sale or conveyance of any or all of the Property on which the Easement Area is located.

19. Lease Restrictions. Grantors shall restrict any leases to uses and activities consistent with the restrictive covenant in these Easements and notify all lessees of the restrictions on the use of the property. This provision may be satisfied by the inclusion into a lease of the restrictions and obligations under Sections 12 through 17 above.

Exhibit F

Schedule for Implementing ICP

EXHIBIT F

City's Projected¹¹ Schedule for IC Implementation

Site Use Restrictions

Maps: Provide maps to EPA showing remedial action and mitigation areas within Thea Foss and Wheeler-Osgood Waterways within ten (10) days of such request. (See, A.1, page 3.)

Restrictive Covenants – City Property: City records restrictive covenants on property it owns within thirty (30) days of EPA approving City's model restrictive covenants, or within thirty (30) days of receiving EPA's Certification of Completion of Remedial Action Construction ("Certification"), whichever is later. (See, A.1, page 3.)

Restrictive Covenants – Owner Settling Defendants: If requested, City provides information to Owner Settling Defendants regarding the nature and scope of remedial actions and habitat mitigation work undertaken on their property. Upon receiving notice from EPA that it has requested Owner Settling Defendants to record restrictive covenants on their property, the City will, within thirty (30) days of receiving such notice, provide Owner Settling Defendants with a map depicting the location of remedial actions and habitat mitigation on their property for attachment to the restrictive covenant they execute and record. (See, A.1, page 3.)

Restrictive Covenants – Non-Settling Property: City meets with non-settling parties regarding filing restrictive covenants on their property within thirty (30) days of receiving EPA's Certification of Completion of Remedial Action Construction, and use best efforts to secure filing of a restrictive covenant on such property within ninety (90) days of receiving EPA's Certification of Completion of Remedial Action Construction. (See, A.2, page 4.)

Institutional Controls Plan to WSDOT: City will provide WSDOT a copy of its Institutional Controls Plan within thirty (30) days of EPA's approval of such plan. (See, A.3, page 5.)

Notice to Owner Settling Defendants

City provides the Owner Settling Defendants identified in Appendix F of the Consent Decree notice that EPA has provided the City its Certification of Completion of Remedial Action Construction. The notice will be made within thirty (30) days of receiving EPA's Certification and will include a copy of the City's Institutional Controls Plan. (See, C, page 10.)

Future Development

Informational Handout: City distributes a final informational handout for distribution by the City's Building and Land Use Division within thirty (30) days of receiving comments from EPA, DNR and the Utilities. The City will prepare a draft handout for review by EPA, DNR and the Utilities within thirty (30) days of receiving EPA's Certification of Completion of Remedial Action Construction. (See, D.1.1, page 11.)

¹¹ This schedule is a projection, actual completion dates could vary depending upon on emergent circumstances, and/or the cooperation and availability of persons outside of the City's Public Works Department - Science and Engineering Division to coordinate completion of the tasks identified in this schedule.

EXHIBIT F

Additional BLUS Training: Will be completed within forty-five (45) days of receiving EPA's approval of the City's Institutional Controls Plan. (See, D.1.2, page 11.) Institutional Control Plans prepared by the City, DNR and the Utilities will be provided to BLUS within thirty (30) days of approval of such plans.

govME Website: Identify and load additional documents on govME website within forty five (45) days of EPA's approval of such documents. (See, D.1.2, at page 11.)

Navigational Maps/Restrictions/Signage

Navigational Maps: Within thirty (30) days of receiving EPA's Certification of Completion of Remedial Action Construction, request NOAA to update its Commencement Bay navigational chart to show North Beach Habitat Area. The City will monitor NOAA's progress on the major update of its navigational chart for Commencement Bay. (See, E.1., page 16.) The City will request the U.S. Coast Guard to publish a Local Notice to Mariners to alert mariners to chart updates within thirty (30) days of such updates. (See, E.1., page 16.)

Regulated Navigation Area: Within sixty (60) days of receiving EPA's Certification of Completion of Remedial Action Construction, request the U.S. Coast Guard to establish a Regulated Navigation Area to restrict anchorage and other activities that could harm or disturb remedial actions in the Thea Foss Waterway.

Signage: Within one hundred and twenty (120) days of receiving EPA's Certification of Completion of Remedial Action Construction, prepare and place signage on docks and upland areas, including signs warning about shellfish harvesting techniques. (See, F.1, at page 17, F.2 at page 17, and H at page 18.)

Install Vehicle Barrier at PRSC

The City will install a vehicle barrier in the City right-of-way abutting the PRSC project site within sixty (60) days of receiving EPA's approval of the City's Institutional Controls Plan. (See, A.6.1, at page 8.)

Coordination with Tacoma Police Marine Unit

Within thirty (30) days of receiving EPA's approval of the City's Institutional Controls Plan, notify, and if requested provide training to the Tacoma Police Marine Unit on institutional controls related to vessel traffic. (See, G., at page 18.)