

Hon. James L. Robart

**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.

CITY OF SEATTLE,

Defendant.

Case No. CV-16-1486

CONSENT DECREE

CONSENT DECREE

U. S. DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
7600 Sand Point Way NE  
Seattle, WA 98115

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## I. INTRODUCTION

The United States of America (“United States”), on behalf of the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (“NOAA”), and the United States Department of the Interior; the State of Washington (the “State”) through the Washington State Department of Ecology; the Suquamish Tribe; and the Muckleshoot Indian Tribe (collectively, “Plaintiffs”), have filed a complaint in this case against defendant City of Seattle (“Settling Defendant”) pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9607; the Model Toxics Control Act (“MTCA”), chapter 70.105D RCW; Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702(b)(2)(A) for Covered Natural Resource Damages (as defined below).

This Consent Decree (the “Decree”) resolves the claims asserted in the Complaint against the Settling Defendant. This Consent Decree also contains separate terms and conditions regarding restoration with Bluefield Holdings, Inc. (“Bluefield”).

## II. RECITALS

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

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

1 C. The Trustees began assessing damages to natural resources in the  
2 LDW in 1990 by finding that hazardous substances had been released into the  
3 LDW; that natural resources had likely been injured by the releases; that data  
4 sufficient to pursue a natural resource damage assessment were available or could  
5 likely be obtained at a reasonable cost; and that, without further action, future  
6 response activities would not adequately remedy the resource injuries. *See, e.g.*,  
7 NOAA, Lower Duwamish Waterway Sediment Characterization Study Report  
8 (Dec. 10, 1998), Elliott Bay Trustee Council, Pre-Assessment Screen for LDR  
9 (December 2009), and Final Lower Duwamish River NRDA Restoration Plan and  
10 Programmatic Environmental Impact Statement (July 2013).  
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15 D. Although the Trustees have initiated but not yet completed a natural  
16 resource damage assessment for the LDW, the Trustees have developed and  
17 analyzed information sufficient to support settlements that are fair, reasonable and  
18 in the public interest.  
19

20 E. As contemplated by this Consent Decree, the City of Seattle entered  
21 into an agreement with Bluefield Holdings, Inc. (“Bluefield”) to develop  
22 restoration projects on the City’s behalf for the purpose, *inter alia*, of resolving  
23 the City’s liability to the Trustees for Covered Natural Resources Damages as  
24 further defined in this Consent Decree.  
25  
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1 F. Upon consideration of the natural resource damage assessment  
2 undertaken to date, Bluefield, on behalf of the City of Seattle and other potentially  
3 responsible parties (“PRPs”), worked collaboratively with the Trustees to  
4 formulate potential habitat restoration projects along the LDW.  
5

6 G. In cooperation with Bluefield, the Trustees created the Natural  
7 Resource Restoration and Enhancement Credit Protocol dated May 24, 2009  
8 (“Protocol”), the purpose of which was to establish guidelines in developing and  
9 implementing such projects. The Protocol related to Bluefield’s habitat  
10 restoration projects along the LDW and was intended solely as a guideline, not as  
11 a legally binding document. The Protocol is not part of this Consent Decree, nor is  
12 the Protocol enforceable pursuant to this Consent Decree.  
13  
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15

16 H. Consistent with the Protocol, and in anticipation of this Consent  
17 Decree, Bluefield initiated work on a number of habitat restoration projects in the  
18 LDW, in cooperation with the City of Seattle. One of those projects – Restoration  
19 Project One, as defined below – is particularly important for purposes of this  
20 Consent Decree. Construction of Restoration Project One is now complete.  
21  
22 Bluefield is now engaged in habitat and vegetation development and monitoring  
23 of Restoration Project One, as described further below and in Appendices A and  
24  
25

26 B.  
27

1 I. In this Consent Decree, the City of Seattle is using restoration credits  
2 from Bluefield to resolve its liability for Covered Natural Resource Damages (as  
3 defined below) with Plaintiffs. Bluefield is not a liable party, as described more  
4 specifically in Paragraphs 8 and 13, but Bluefield is a party to this Consent Decree  
5 because it has agreed to perform certain work on behalf of the City of Seattle.  
6 The obligations of the City of Seattle and Bluefield, on behalf of the City of  
7 Seattle, with respect to Restoration Project One and other habitat restoration  
8 projects are set forth in this Consent Decree.  
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12 J. Plaintiffs have filed a complaint (the “Complaint”) pursuant to  
13 Section 107 of CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW;  
14 CWA, 33 U.S.C. § 1251 et seq.; and OPA, 33 U.S.C. § 2701 et seq., seeking  
15 recovery from Settling Defendant of damages for injury to, destruction of, and  
16 loss of natural resources resulting from releases of hazardous substances into the  
17 LDW, including, but not limited to, the costs of assessing the damages.  
18  
19

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

10  
11  
12  
13 L. Plaintiffs specifically allege in the Complaint that Settling Defendant  
14 owns or in the past owned and/or operated real property, Combined Sewer  
15 Overflows (CSOs), storm drains and other facilities on, adjacent to, or near the  
16 LDW, including but not limited to the Georgetown Steam Plant, that were sources  
17 of contamination. Plaintiffs further allege that from each of such sites identified  
18 in Appendix F, the storm water, surface water runoff, wastewater, other process  
19 discharges, and/or groundwater have flowed to the LDW. Plaintiffs also allege  
20 that investigations have detected hazardous substances in soils, groundwater or  
21 sediments on or in those properties and/or facilities. Some of these hazardous  
22 substances are found in the sediments of the LDW.

1 M. Plaintiffs further allege that hazardous substances have been or are  
2 being released to the LDW from properties or facilities owned and/or operated by  
3 Settling Defendant through direct discharge or other process discharges, and that  
4 those hazardous substances have caused injury to, destruction of and loss of  
5 natural resources in the LDW under Plaintiffs' trusteeship, including fish,  
6 shellfish, invertebrates, birds, marine sediments, and resources of cultural  
7 significance. Plaintiffs further allege that each of them and the public have  
8 suffered the loss of natural resource services (including ecological services as well  
9 as direct and passive human use losses) as a consequence of those injuries.  
10  
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12

13 N. On or around December 23, 1991, Settling Defendant entered into a  
14 Consent Decree with the Trustees resolving its liability for certain natural resource  
15 damages through the effective date of that Consent Decree as related to various  
16 sources of contamination by City-controlled facilities located along the LDW  
17  
18 (*United States of America, et al v. City of Seattle and Municipality of*  
19 *Metropolitan Seattle*, Civil No. C90-395WD). That Consent Decree was amended  
20 on October 13, 1999. This Consent Decree addresses the City's liability for  
21 Covered Natural Resource Damages (as defined herein) not addressed by the  
22 previous consent decree, including Covered Natural Resource Damages (as  
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1 defined herein) that have occurred after the effective date of the previous consent  
2 decree.

3 O. Based on the above findings, the Plaintiffs concluded that no further  
4 natural resource damage assessment is required to effectuate the purposes of this  
5 Consent Decree, with respect to Settling Defendant.  
6

7 P. Settling Defendant denies all or portions of the allegations of the  
8 Complaint, and all or portions of the allegations contained in Paragraphs K  
9 through M of this Section.  
10

11 Q. The Restoration Project One described in Appendix A has been  
12 constructed and is currently being implemented by Bluefield, including but not  
13 limited to, all tasks associated with operations, maintenance, monitoring, and  
14 adaptive management. Settling Defendant and Bluefield have taken the steps  
15 necessary to permanently dedicate the Restoration Project One Site, as defined  
16 herein and as set forth in Appendix D, and in a manner consistent with the  
17 Environmental Covenant granted by the City for Restoration Project One.  
18

19 R. Under the terms of this Consent Decree, Bluefield also is responsible  
20 for implementing a vegetation plan and monitoring vegetation and habitat  
21 performance for Restoration Project One for at least ten years after completion of  
22 construction.  
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1           S.       In settlement of this action, Settling Defendant has agreed, in lieu of  
2 and as equivalent to monetary damages, to fund a portion of the Restoration  
3 Projects by purchasing twenty-eight (28) discounted service acre-year (“DSAY”)  
4 credits from Bluefield as documented by letter dated March 30, 2011, evidencing  
5 the transfer and sale of twenty (20) DSAYs, and Certificate No. 2 dated December  
6 12, 2013, evidencing the transfer and sale of eight (8) DSAYs. In addition, the  
7 Settling Defendant agrees to reimburse a portion of the natural resource damage  
8 assessment costs incurred by the Trustees. Settling Defendant shall not be  
9 responsible for costs incurred by the Trustees in their work and negotiations with  
10 Bluefield. Plaintiffs’ agreement to settle their claims against Settling Defendant  
11 for the equivalent of 28 DSAYs represents approximately 0.53% of the current  
12 total estimated DSAYs for the LDW (including DSAYs accounted for in prior  
13 settlements with other PRPs for hazardous substance contamination of the LDW  
14 as well as releases of hazardous substances by non-settling parties). In light of on-  
15 going and anticipated restoration activities, the Trustees have estimated the cash  
16 damages equivalent of the DSAYs allocated to Settling Defendant (at an estimated  
17 cost of \$140,000 per DSAY) to total \$3,920,000.

18  
19           T.       Settling Defendant has further agreed to utilize funds to be paid by  
20 Bluefield to fund the long term, permanent stewardship costs for any and all of the  
21

1 Restoration Projects constructed on land owned or operated by the Settling  
2 Defendant included in the Master Lease Agreement between the City and  
3 Bluefield, and as defined in this Consent Decree.  
4

5 U. When Bluefield completes the construction, maintenance, operation,  
6 and monitoring of each Restoration Project, including any required adaptive  
7 management, Bluefield shall vacate the Restoration Project Site and relinquish  
8 control of the Project back to the Settling Defendant. Upon such vacation and  
9 relinquishment of control of each Project by Bluefield, the Settling Defendant will  
10 assume responsibilities for the long term stewardship of each Restoration Project  
11 and Site, including maintaining vegetation and habitat performance.  
12  
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14

15 V. The Trustees have determined that the payments previously made by  
16 Settling Defendant to Bluefield for funding the construction of Restoration Projects  
17 as recited in Paragraph S and T above in this Consent Decree are appropriate and  
18 necessary to protect and restore the natural resources injured as a result of alleged  
19 actions or omissions of Settling Defendant that are addressed herein, and that such  
20 timely payments by Settling Defendant are adequate to redress Settling  
21 Defendant's responsibility for the Covered Natural Resource Damages that are the  
22 subject of this proceeding.  
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1           W.     Settling Defendant does not admit any liability to Plaintiffs arising out  
2 of the transactions or occurrences alleged in the Complaint and the matters alleged  
3 in this Consent Decree.  
4

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

3 Y. Plaintiffs, Settling Defendant, and Bluefield agree, and this Court by  
4 entering this Decree finds, that this Decree has been negotiated by the Parties in  
5 good faith; that settlement of this matter will avoid prolonged and complicated  
6 litigation between the Parties; and that this Decree is fair, reasonable, and in the  
7 public interest.  
8

9  
10 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:  
11

### 12 **III. JURISDICTION AND VENUE**

13 1. This Court has jurisdiction over the subject matter of this action  
14 pursuant to 28 U.S.C. §§ 1331, 1345 and 1367, 42 U.S.C. § 9613(b), and 33 U.S.C.  
15 § 2717(b). The Court has personal jurisdiction over the Parties. Solely for the  
16 purposes of this Decree and the underlying Complaint, the Parties waive all  
17 objections and defenses that they may have to jurisdiction of the Court or to venue  
18 in this District. The Parties may not challenge the terms of this Decree or this  
19 Court's jurisdiction to enter and enforce this Decree.  
20  
21

### 22 **IV. PARTIES BOUND**

23 2. This Decree is binding upon the United States, the State, the  
24 Suquamish Tribe, the Muckleshoot Indian Tribe, Settling Defendant and its  
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1 successors and assigns, and Bluefield and its successors and assigns. Any change  
2 in ownership or corporate or other legal status, including but not limited to any  
3 transfer of assets or real or personal property, will in no way alter the status or  
4 responsibilities of Settling Defendant or Bluefield under this Decree.  
5

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

23           4. Unless otherwise expressly provided, terms used in this Decree that  
24 are defined in CERCLA or in regulations promulgated under CERCLA have the  
25 meanings assigned to them in CERCLA or in such regulations. Whenever the  
26  
27



1 terms listed below are used in this Decree or in any attached appendix, the  
2 following definitions will apply:

3           a.       “As-built Drawings” means the revised set of drawings that  
4 were previously submitted by Bluefield or one of its contractors upon completion  
5 of the Restoration Project One, which reflect all changes made in the specifications  
6 and working drawings during the construction process, and show the dimensions,  
7 geometry, and location of all elements of the work completed pursuant to the  
8 Appendix A.

9           b.       “Bluefield Holdings, Inc.” or “Bluefield” is a business entity  
10 that, among other things, designs, constructs, and maintains natural resource  
11 restoration and enhancement projects on behalf of persons that are liable for  
12 natural resource damages at properties that have suffered a loss of natural  
13 resources pursuant to CERCLA.

14           c.       “CERCLA” means the Comprehensive Environmental  
15 Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §  
16 9601, *et seq.*

17           d.       “Consent Decree” or “Decree” means this Consent Decree and  
18 all attached appendices. In the event of a conflict between this Consent Decree and  
19 any Appendix, the Consent Decree will control.

1 e. “Covered Natural Resource Damages” means damages,  
2 including costs of damage assessment, recoverable under Section 107 of CERCLA,  
3 42 U.S.C. § 9607; Chapter 70.105D RCW; Section 311 of the Clean Water Act  
4 (“CWA”), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of  
5 1990 (“OPA”), 33 U.S.C. § 2702(b)(2)(A) and any other statutory or common law,  
6 for injury to, destruction of, or loss of natural resources resulting from releases of  
7 hazardous substances or discharges of oil to the LDW and/or Elliott Bay, or  
8 adjoining shorelines, where such release or discharge occurred on or before the  
9 Effective Date of this Consent Decree, and are subsequent to the December 23,  
10 1991 Consent Decree at or from the locations described in Appendix F.

11 f. “Day” means a calendar day. In computing any period of time  
12 under this Consent Decree, where the last day falls on a Saturday, Sunday, or  
13 federal holiday, the period of time will run until the close of business of the next  
14 working day. “Working day” means a day other than a Saturday, Sunday, or  
15 Federal holiday.

16 g. “Discounted Service-Acre Year” (DSAY) means the amount of  
17 a specific suite of ecological services determined to be produced per acre of a  
18 given type of habitat over a period of years, the total of which are discounted to a  
19 present value.

1           h.       “Effective Date” shall be the date on which this Consent Decree  
2 is entered by the Court, or, if the Court instead issues an order approving the  
3 Consent Decree, the date of such order.  
4

5           i.       “Elliott Bay” means any portion of Elliott Bay (including the  
6 shoreline, intertidal and subtidal areas, tributaries, estuaries and bottom sediments)  
7  
8 in the State of Washington where hazardous substances originating from the  
9 locations identified in the definition of Covered Natural Resource Damages have  
10 come to be located.  
11

12           j.       “Lower Duwamish Waterway” or “LDW” means any portion of  
13 the Duwamish Waterway (including the shoreline, intertidal and subtidal areas,  
14 tributaries, estuaries and bottom sediments) in the State of Washington where  
15 hazardous substances originating from the locations identified in the definition of  
16 Covered Natural Resource Damages have come to be located.  
17  
18

19           k.       “MTCA” means the Model Toxics Control Act, Chapter  
20 70.105D RCW.  
21

22           l.       “Master Lease Agreement” means the agreement between the  
23 City of Seattle and Bluefield, effective February 23, 2009, pursuant to Ordinance  
24 Number 122729, including the letter agreement amendments dated December 17,  
25 2012, and May 26, 2017. The Master Lease Agreement is attached hereto in  
26  
27

Appendix C.

m. “Natural Resources” means that definition as provided in 42 U.S.C. § 9601(16).

n. “Parties” means the United States, the State of Washington, the Suquamish Tribe, the Muckleshoot Indian Tribe, Bluefield, and Settling Defendant.

o. “Performance Guarantees” mean the escrow account in Appendix E1 and the letter of credit in Appendix E2 established for operations and maintenance of Project 1 and adaptive management of Project 1, respectively.

p. “Plaintiffs” means the United States, the State, the Suquamish Tribe, and the Muckleshoot Indian Tribe.

q. “Restoration Project One” or “Project One” means the project described in Appendix A.

r. “Restoration Project One Site” or “Project One Site” means the areas shown and/or described in Appendix B and is the property on which Restoration Project One is situated.

s. “Restoration Project Sites” or “Project Sites” means the property(ies) owned or controlled by Settling Defendant as identified in the Master Lease Agreement attached as Appendix C, including Restoration Project One Site,

1 on which natural resource restoration projects are anticipated to be constructed by  
2 Bluefield on land owned by Settling Defendant and for which any ecological  
3 credits have been sold to a potentially responsible party to resolve their natural  
4 resource damages liability arising out of releases of hazardous substances to LDW.  
5

6 t. “Restoration Projects” means the natural resource restoration  
7 projects, including Restoration Project One, to be developed on the Restoration  
8 Project Sites.  
9

10 u. “Settling Defendant” means the City of Seattle (or “City”).  
11

12 v. “Stewardship” means actions intended to preserve, protect or  
13 maintain Restoration Projects and the Project Sites constructed by Bluefield under  
14 the terms of the Master Lease Agreement (Appendix C), including (a) maintaining,  
15 restoring or replacing the ecological function of the Restoration Projects; and (b)  
16 maintaining, restoring or replacing physical components of the Restoration  
17 Projects.  
18  
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20 w. “Trustees” mean the United States Department of Commerce,  
21 acting through NOAA; the United States Department of the Interior; the  
22 Washington State Department of Ecology, on behalf of the State of Washington;  
23 the Suquamish Tribe; and the Muckleshoot Indian Tribe.  
24  
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26 x. “United States” shall mean the United States of America and  
27

1 each department, agency and instrumentality of the United States, including the  
2 United States Department of Commerce and the United States Department of the  
3 Interior.  
4

## 5 **VI. GENERAL PROVISIONS**

6 5. In the Master Lease Agreement, Settling Defendant agreed to allow  
7 Bluefield to construct and implement habitat restoration projects along the LDW  
8 on properties owned or controlled by Settling Defendant. Plaintiffs to this action  
9 shall have the same rights as Bluefield under the terms and conditions of the  
10 Master Lease Agreement where such rights relate to the development and  
11 implementation of Project One. Plaintiffs do not assume any of the obligations of  
12 Bluefield under the Master Lease Agreement.  
13  
14  
15

16 6. Settling Defendant and Bluefield agree that the Trustees have the sole  
17 authority and unreviewable discretion to review and approve any changes to any  
18 Restoration Project and to establish the ecological value for each Restoration  
19 Project, so long as any changes comply with all applicable laws.  
20  
21

22 7. Settling Defendant and Bluefield agree that the Trustees have the sole  
23 and unreviewable discretion for amending or modifying the post-construction work  
24 set forth in Appendix A and for determining the ecological value of Project One, so  
25 long as any amendments or modifications comply with all applicable laws.  
26  
27

**VII. TERMS AND CONDITIONS APPLICABLE ONLY TO BLUEFIELD**

8. Except as specifically provided in this Section VII, the Terms and Conditions set forth in this Section VII of the Consent Decree are applicable to and enforceable against Bluefield only (including Bluefield's successors and assigns), and Bluefield's insurers and sureties where specifically provided. Neither Bluefield's status as a Party to this Consent Decree, nor any provision of this Consent Decree, shall impose liability on Bluefield, or alter or affect Bluefield's liability (or absence of liability), pursuant to CERCLA, OPA, MTCA, or the CWA. Nothing in this Consent Decree shall shield or relieve Bluefield from liability pursuant to CERCLA, OPA, MTCA, or the CWA for Bluefield's acts that otherwise would result in liability under those statutes absent this Consent Decree.

9. All activities undertaken by Bluefield to develop and implement Project One shall be performed in accordance with the requirements of all applicable laws and permits.

10. Bluefield shall ensure that all work performed under this Consent Decree shall be conducted as set forth in Appendix A attached hereto. If the Trustees determine that Bluefield is not complying with the requirements set forth in the Decree and Appendix A, the Trustees shall provide prompt written notice to Bluefield specifying the basis for their determination of noncompliance. Bluefield

1 may correct the noncompliance or invoke the Dispute Resolution procedures set  
2 forth in Section X below and to the extent allowed under this Decree. The  
3 Trustees may require Bluefield to take actions, to alter, suspend or cease ongoing  
4 activities, and to alter, postpone or refrain from taking proposed actions, as are  
5 necessary to ensure compliance with the terms of this Consent Decree and any  
6 plans or proposals adopted hereunder.  
7

9 11. This Consent Decree is not, and shall not be construed to be, a permit  
10 issued pursuant to any law.  
11

12 12. Where any portion of the activities undertaken pursuant to this  
13 Consent Decree requires a federal, state or local permit or approval, Bluefield shall  
14 submit timely and complete applications and take all other actions necessary to  
15 obtain such permits or approvals. Bluefield may seek relief under the provisions of  
16 Section IX (Force Majeure) for any delay in or prevention of the performance of  
17 the obligations of this Section resulting from a failure to obtain, or a delay in  
18 obtaining, any federal or state permit or approval required for such performance,  
19 provided that it has submitted timely and complete applications and taken all other  
20 actions reasonably necessary to obtain all such permits or approvals.  
21

22 13. Plaintiffs do not, by their consent to the entry of this Consent Decree,  
23 warrant or aver in any manner that Bluefield's compliance with this Consent  
24



1 Decree will result in compliance with CERCLA or any other law. Compliance  
2 with this Consent Decree does not diminish or affect Bluefield's responsibility to  
3 comply with any applicable federal, state or local law or regulation. The Parties  
4 agree that Bluefield is responsible for achieving and maintaining complete  
5 compliance with all applicable federal, state and local laws, regulations and  
6 permits.  
7  
8

9 **A. Project Implementation**

10 14. Bluefield shall develop and implement Project One, and shall perform  
11 the required post-construction operations and maintenance, monitoring, and  
12 adaptive management activities in accordance with the terms set out in Appendix  
13 A.  
14  
15

16 15. The Parties agree that Bluefield completed construction of Project  
17 One and submitted a written Notice of Completion to the Trustees. The Trustees  
18 have reviewed Project One and on September 4, 2014, sent a written notice of the  
19 Trustees' determination that the Project has been so completed (Notice of  
20 Approval of Completion). September 4, 2014, shall constitute the "Construction  
21 Completion Date."  
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**B. Development and Monitoring of Vegetation and Habitat**

16. As more fully described in Appendix A, Bluefield shall develop and monitor vegetation and habitat until September 4, 2024 (ten years from the Construction Completion Date of Project One). Upon completion of the ten-year period, Bluefield shall provide written Notice of Completion of Vegetation and Habitat Development and Monitoring Obligations to the Trustees in accordance with Section XIX (Notices and Submissions). Within forty-five (45) days after receiving the Notice of Completion of Vegetation and Habitat Development and Monitoring Obligations, the Trustees shall submit to Bluefield either (a) a written notice identifying specific deficiencies the Trustees determine must be corrected for the vegetation and habitat development and monitoring obligations to be completed in accordance with Appendix A (Notice of Deficiencies); or (b) a written notice of the Trustees' determination that the vegetation and habitat development and monitoring obligations are completed (Approval of Completion of Vegetation and Habitat Development and Monitoring Obligations). The date of the Trustees' Approval of Completion of Vegetation and Habitat Development and Monitoring Obligations for Project One shall constitute the "Vegetation and Habitat Development and Monitoring Completion Date."

1           17. In the event the Trustees identify, in a Notice of Deficiencies, specific  
2 deficiencies with Bluefield's compliance with its obligations in Paragraph 16,  
3 Bluefield shall correct the identified deficiencies and complete Project One in  
4 accordance with Appendix A. Within sixty (60) days of Bluefield's receipt of a  
5 Notice of Deficiencies from the Trustees, or as otherwise allowed by the Trustees,  
6 Bluefield shall submit to the Trustees an amended Notice of Completion of  
7 Vegetation and Habitat Development and Monitoring Obligations for review and  
8 response in accordance with this Paragraph.  
9

10  
11  
12           18. To the extent there are any deficiencies identified by the Trustees  
13 regarding Project One, the Settling Defendant agrees to allow Bluefield access to  
14 the Project One Site to complete Trustee-required actions even if such work  
15 requires Bluefield to conduct activities beyond the 10-year period contemplated  
16 under the Master Lease Agreement, so long as any required actions comply with  
17 all applicable laws.  
18  
19

20  
21           19. During the ten-year period described in Paragraphs 16-18, Bluefield  
22 shall be responsible for undertaking corrective actions for any perturbation that  
23 affects the ecological integrity or function of Project One. Perturbations include  
24 events with a foreseeable probability of occurrence (such as, for example, the  
25 beaching of an abandoned barge) but do not include "force majeure" events.  
26  
27

20. Bluefield shall provide for continued maintenance and corrective actions in accordance with this Section until the Vegetation and Habitat Development and Monitoring Completion Date, regardless of ownership of the Project One Site. The Trustees recognize that the Project One Site may include property that is owned by other parties. Bluefield recognizes that it is solely responsible for securing the cooperation of other property owners in order to successfully complete and maintain Project One in accordance with Appendix A. Any failure by Bluefield to successfully complete or maintain Project One in accordance with Appendix A resulting from disputes with other property owners shall not constitute a “force majeure” event.

### **C. Restoration Project Credits**

21. Restoration Project One’s ecological value on the Construction Completion Date was 46.9 DSAYs. Since that date, events at the Restoration Project One Site have moderately diminished the ecological value of that project. The Trustees have revised the ecological value of the project, under the terms of the Protocol, to its current ecological value of 43.95 DSAYs.

22. The City of Seattle purchased from Bluefield twenty-eight (28) DSAYs credited by the Trustees in order to resolve the liability of the City of Seattle as set forth in this Consent Decree. To the extent that any of the remaining

1 DSAY credits (those in excess of the 28 credits) have not already been sold by  
2 Bluefield to other potentially responsible parties, Bluefield may use such  
3 remaining DSAY credits credited by the Trustees to Project One and other  
4 Restoration Projects to resolve the liability of other potentially responsible parties  
5 in other settlements with the Trustees, subject to the limitations in Paragraph 24  
6 below.  
7  
8

9 23. All funds to be paid pursuant to this Section shall be paid in  
10 accordance with the procedure set forth in Section XI (Stipulated Penalties).  
11

12 24. At any time until the Vegetation and Habitat Development and  
13 Monitoring Completion Date, the Trustees may re-evaluate the ecological  
14 valuation of Restoration Project One and adjust any ecological values previously  
15 determined by the Trustees. The ecological valuation by the Trustees is to be made  
16 at the unreviewable discretion of the Trustees and is not subject to Section X  
17 (Dispute Resolution). The Trustees' exercise of their discretion to re-evaluate the  
18 ecological value of Project One shall have no effect on the quantity or value of  
19 DSAYs previously purchased by Settling Defendant.  
20  
21  
22

23 25. Bluefield agrees that it will not enter into any agreement with any other  
24 potentially responsible party(ies) that provides ecological credits in an amount that  
25 exceeds the remaining total ecological value of Restoration Project One set forth in  
26  
27

1 Paragraph 21, and as adjusted according to the provisions of Paragraph 24. The  
2 ecological value of Restoration Project One will be determined in the sole and  
3 unreviewable discretion of the Trustees.  
4

5 26. Bluefield will maintain a registry that will set forth the transfer of the  
6 ecological credits of Restoration Project One in a manner to ensure that Bluefield  
7 does not transfer ecological credits that exceed, at the time of the transfer, the  
8 available ecological credits assigned by the Trustees for Project One. Bluefield  
9 will provide Plaintiffs with an updated version of the registry every quarter  
10 commencing the first quarter subsequent to the Effective Date.  
11

12  
13 **D. Reimbursement of Restoration Implementation Costs**  
14

15 27. Bluefield agrees to reimburse the Trustees' costs incurred in  
16 implementing and overseeing Restoration Project One. Settling Defendant shall  
17 not be responsible for costs incurred by the Trustees in the Trustees' work and  
18 negotiations with Bluefield. Each year, beginning on the Effective Date of this  
19 Decree, the Trustees shall provide Bluefield with an invoice detailing their  
20 unreimbursed costs through the prior calendar year of implementing and  
21 overseeing Restoration Project One. Within sixty (60) days of receipt of the  
22 Trustees' invoice, Bluefield shall reimburse the Trustees for those costs. If  
23 Bluefield believes that any of the Trustees' invoiced costs were not incurred in  
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1 implementing and overseeing Restoration Project One, Bluefield may invoke the  
2 Dispute Resolution provisions of Section X within sixty (60) days of receipt of the  
3 Trustees' invoice as to the disputed costs only; any costs for which Bluefield does  
4 not invoke Dispute Resolution shall be paid within sixty (60) days of receipt of the  
5 Trustees' invoice. The last year for which the Trustees' costs incurred in  
6 implementing and overseeing the Project shall be reimbursed by Bluefield shall be  
7 the calendar year following the Vegetation and Habitat Development and  
8 Monitoring Completion Date.

9  
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11  
12 **E. General Project Development Provisions**

13 28. Bluefield shall avoid taking any action that is inconsistent with this  
14 Consent Decree and/or that would adversely affect Restoration Project One.

15 29. Bluefield shall undertake all activities required to address cultural  
16 resource issues associated with Restoration Project One, including, as applicable,  
17 consultation with tribes and the Washington State Department of Archaeology and  
18 Historic Preservation, conducting a background and project review by an  
19 archaeologist who meets the U.S. Department of the Interior's professional  
20 qualification standards at 36 C.F.R. Part 61, and conducting cultural resource  
21 surveys or monitoring activities.

1           30. To the extent there are any deficiencies at any Restoration Project as  
2 identified by the Trustees, Settling Defendant agrees to allow Bluefield access to  
3 any Project and/or Project Site to complete Trustee-required actions even if such  
4 work requires Bluefield to conduct activities beyond the 10-year period  
5 contemplated under the Master Lease Agreement, so long as the Trustee-required  
6 activities comply with all applicable laws.  
7  
8

9           31. For the time frame during which Bluefield is conducting activity  
10 related to Project One on the Project One Site, Bluefield will take the steps  
11 necessary to ensure the Trustees' access to the Project One Site.  
12

13           32. The Trustees may conduct additional work, as they may deem  
14 appropriate, at their own expense, on any of the Restoration Project Sites, so long  
15 as any additional work complies with all applicable laws. Bluefield shall provide  
16 the Trustees with access to the Restoration Project Sites to conduct such work and  
17 to monitor the condition of the Restoration Project Sites. If such work is  
18 conducted prior to completion of initial construction by Bluefield, the Trustees will  
19 conduct any such work in a manner that does not hinder Bluefield's timely  
20 completion of the Restoration Projects. The provisions of this Paragraph are  
21 applicable to, and enforceable against, both Bluefield and the City of Seattle.  
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33. In no event shall the Trustees perform any additional work that will interfere with Bluefield's obligations under this Consent Decree, the construction, maintenance, operation, or monitoring of the Restoration Projects, Settling Defendant's use of its properties, or that otherwise affects the performance criteria of this Consent Decree.

#### **F. Selection of Contractors**

34. The selection of any contractor hereafter retained by Bluefield to perform any of the work required under this Consent Decree shall be subject to Trustee approval. Bluefield shall notify the Trustees in writing of the name, title and qualifications of any contractor Bluefield proposes to retain, and of any proposed changes in the selection of a contractor. The Trustees will notify Bluefield in writing of the approval or disapproval of a proposed contractor. The Trustees' assent to the proposed selection or change of a contractor may be presumed unless the Trustees notify Bluefield in writing of their objection to the proposed selection or change within thirty (30) days of Bluefield's written selection notice.

#### **G. Performance Guarantee**

35. Performance Guarantees. Bluefield shall maintain a Performance Guarantee for operation and maintenance of Restoration Project One in the amount

1 of \$208,442.63 as set forth in Appendix E1, beginning on or before the Effective  
2 Date of this Consent Decree and continuing until released as set forth in this sub-  
3 Section, such that the Performance Guarantee is legally binding and fully effective.  
4  
5 Bluefield shall maintain a Performance Guarantee for adaptive management of  
6 Restoration Project One in the amount of \$46,000 as set forth in Appendix E2,  
7  
8 beginning on or before the Effective Date of this Consent Decree and continuing  
9 until released as set forth in this sub-Section, such that the Performance Guarantee  
10 is legally binding and fully effective.  
11

12 36. Release of Performance Guarantee. Bluefield shall not release, cancel,  
13 or discontinue any Performance Guarantee provided for the Restoration Project  
14 One except as provided pursuant to this sub-Section and as set forth in Appendices  
15 E1 and E2. If the Trustees issue the Approval of Completion of Vegetation and  
16 Habitat Development And Monitoring Obligations in accordance with Paragraph  
17 16, or if the Trustees otherwise so notify Bluefield in writing, Bluefield may  
18 thereafter release, cancel, or discontinue the Performance Guarantees for  
19 Restoration Project One provided pursuant to this sub-Section and as described in  
20 Appendices E1 and E2. In the event of a dispute, Bluefield may release, cancel, or  
21 discontinue the Performance Guarantee(s) required hereunder only in accordance  
22 with the terms and conditions of the Performance Guarantee(s) or the final  
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1 administrative or judicial decision resolving such dispute pursuant to Section X  
2 (Dispute Resolution).

3       37. Cancellation of Performance Guarantee. If at any time the Trustees  
4 are notified by the Escrow Agent appointed pursuant to Appendix E1 that the  
5 Escrow Agent intends to resign, then, unless Bluefield provides a substitute  
6 performance guarantee mechanism that is acceptable to the Trustees no later than  
7 twenty (20) days prior to the impending resignation date, the Trustees shall be  
8 entitled (as of and after the date that is twenty (20) days prior to the impending  
9 resignation) to immediately draw fully on the funds in the Escrow Account  
10 established pursuant to the Performance Guarantee in Appendix E1 without any  
11 further notice to Bluefield. If at any time the Trustees are notified by the financial  
12 institution that issues the letter of credit in Appendix E2 that the financial  
13 institution elects not to extend the letter of credit beyond the current expiration  
14 date, then, unless Bluefield provides a substitute performance guarantee  
15 mechanism that is acceptable to the Trustees no later than twenty (20) days prior to  
16 the impending expiration date, the Trustees shall be entitled (as of and after the  
17 date that is twenty (20) days prior to the impending expiration) to immediately  
18 draw fully on any or all funds authorized in the letter of credit in Appendix E2  
19 without any further notice to Bluefield.  
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1           38.   Exercise of Performance Guarantees. In the event the Trustees  
2 determine that Bluefield has failed to conduct operation and maintenance of  
3 Restoration Project One in accordance with Appendix A, then the Trustees may  
4 issue a written notice (“Exercise of Performance Guarantee Notice”) to Bluefield  
5 as set forth in Appendix E1. In the event the Trustees determine that Bluefield has  
6 failed to conduct adaptive management of Restoration Project One in accordance  
7 with Appendix A or any Adaptive Management Plan, then the Trustees may issue a  
8 written notice (“Exercise of Performance Guarantee Notice”) to Bluefield. Any  
9 Exercise of Performance Guarantee Notice issued by the Trustees will specify the  
10 grounds upon which such notice was issued and will provide Bluefield an  
11 opportunity to remedy the deficiencies specified in the Exercise of Performance  
12 Guarantee Notice, which notice will be provided as set forth in Section XIX  
13 (Notices and Submissions) and Appendix E1.  
14

15           39.   Bluefield shall remedy, to the Trustees’ satisfaction, the deficiencies  
16 set forth in the Exercise of Performance Guarantee Notice within fifteen (15)  
17 working days of receipt of such notice. If Bluefield has not remedied to the  
18 Trustees’ satisfaction the deficiencies set forth in the Exercise of Performance  
19 Guarantee Notice within fifteen (15) working days of Bluefield’s receipt of such  
20 notice, the Trustees may at any time thereafter exercise the Performance Guarantee  
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1 established pursuant to this Section as the Trustees deem necessary (“Exercise of  
2 Performance Guarantee”) to complete the operation and maintenance or the  
3 adaptive management, as applicable, of Restoration Project One. The Trustees will  
4 notify Bluefield in writing (which writing may be electronic) if the Trustees  
5 determine that an Exercise of Performance Guarantee is warranted under this  
6 Paragraph.  
7  
8

9       40. Except as specifically provided elsewhere in this Consent Decree,  
10 Bluefield may invoke the procedures set forth in Section X (Dispute Resolution),  
11 to dispute the Trustees’ Exercise of Performance Guarantee under Paragraph 38.  
12 However, notwithstanding Bluefield’s invocation of such dispute resolution  
13 procedures, and during the pendency of any such dispute, the Trustees may in their  
14 sole discretion commence and continue an Exercise of Performance Guarantee  
15 under Paragraphs 38 and 39 until the earlier of (1) the date that Bluefield remedies,  
16 to the Trustees’ satisfaction, the circumstances giving rise to the Trustees’ issuance  
17 of the Exercise of Performance Guarantee Notice, or (2) the date that a final  
18 decision is rendered in accordance with Section X (Dispute Resolution) requiring  
19 the Trustees to terminate such Exercise of Performance Guarantee. Following  
20 either event, the Trustees shall cease obligating any further funds from the  
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1 Performance Guarantee but shall not be required to repay any funds already  
2 obligated or spent by the Trustees.

3 **H. Bluefield Indemnification; Insurance**  
4

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

6 42. Plaintiffs shall give Bluefield written notice of any claim for which  
7 one or more Plaintiff plans to seek indemnification pursuant to Paragraph 41, and  
8 shall consult with Bluefield (including, but not limited to, responding to  
9 Bluefield's reasonable requests for information regarding any proposed settlement  
10 of that claim) prior to settling such claim.  
11

12 43. Bluefield 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 Bluefield and any person for performance of activities pursuant to this Consent  
16 Decree, including, but not limited to, claims on account of construction delays. In  
17 addition, Bluefield shall indemnify and hold harmless Plaintiffs with respect to any  
18 and all claims for damages or reimbursement arising from or on account of any  
19 contract, agreement, or arrangement between Bluefield and any person for  
20 performance of activities pursuant to this Consent Decree, including, but not  
21 limited to, claims on account of construction delays.  
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1           44.     No later than fifteen (15) days before commencing any work on the  
2 Project Sites, Bluefield shall cause to be maintained comprehensive general  
3 liability insurance and automobile liability insurance with limits of five million  
4 dollars (\$5,000,000), combined single limit. The Trustees shall be named  
5 additional insureds on any such policies with respect to all liability arising out of  
6 the activities performed by or on behalf of Bluefield pursuant to this Consent  
7 Decree. In addition, for the duration of this Consent Decree Bluefield shall satisfy,  
8 or shall ensure that their contractors or subcontractors satisfy, all applicable laws  
9 and regulations regarding the provision of worker's compensation insurance for all  
10 persons performing any work involved in implementing this Consent Decree. No  
11 later than fifteen (15) days before commencing any work involved in implementing  
12 this Consent Decree, Bluefield shall provide to the Trustees certificates of such  
13 insurance and copies of such insurance policies. Bluefield shall resubmit such  
14 certificates and copies of policies each year on the anniversary of the Effective  
15 Date of this Consent Decree. If Bluefield demonstrates by evidence satisfactory to  
16 the Trustees that any contractor or subcontractor maintains insurance equivalent to  
17 that described above, or insurance covering the same risks but in a lesser amount,  
18 then, with respect to that contractor or subcontractor, Bluefield need provide only  
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1 that portion of the insurance described above that is not maintained by the  
2 contractor or subcontractor.

3  
4 **I. Stewardship**

5 45. Pursuant to the Appendix C (Master Lease Agreement), at least six (6)  
6 months prior to the expiration of the Project Term (as defined in the Master Lease  
7 Agreement), Bluefield agrees to pay Settling Defendant a one-time payment for the  
8 post-Project Term long term maintenance of each Restoration Project. Such long-  
9 term maintenance payment shall be calculated in accordance with the provisions of  
10 the Master Lease Agreement.  
11  
12

13 **VIII. TERMS AND CONDITIONS APPLICABLE ONLY TO CITY OF**  
14 **SEATTLE**

15 46. The terms and conditions set forth in this Section VIII are applicable  
16 and enforceable against Settling Defendant only.  
17

18 47. The Complaint states claims against Settling Defendant upon which  
19 relief may be granted.  
20

21 48. Nothing in this Consent Decree shall be construed as an admission of  
22 liability by Settling Defendant for any claims or allegations made in the Complaint  
23 or in this Consent Decree.  
24

25 49. This Consent Decree shall not be used as evidence of Settling  
26 Defendant's alleged liability in any action or proceeding other than an action or  
27

proceeding to enforce the terms of this Consent Decree.

50. Settling Defendant and Bluefield entered into the Master Lease Agreement. Under the Master Lease Agreement, one or more Restoration Projects shall be developed on the Restoration Project Sites identified in the Master Lease Agreement. Settling Defendant has funded a portion of the Restoration Projects by purchasing twenty-eight (28) discounted service acre-year (“DSAY”) credits from Bluefield.

51. Settling Defendant will take the steps necessary to ensure the permanency of all Restoration Projects and Project Sites, and to ensure the Trustees permanent access to all Restoration Project Sites.

**A. Settling Defendant’s Stewardship Obligations**

52. The Parties intend for the ecological functions provided by Project One to be maintained in perpetuity. After the Vegetation and Habitat Development and Monitoring Completion Date, Bluefield’s responsibility for Project One shall cease, and Settling Defendant shall be solely responsible for the Stewardship of Project One and for maintaining its ecological function.

53. As part of the permanent Stewardship obligation, Settling Defendant will grant an environmental covenant in the form set forth in Appendix D for each Restoration Project to ensure all ecological functions provided by all Restoration

1 Projects will be maintained in perpetuity. Moreover, Settling Defendant will  
2 utilize all funds provided by Bluefield for Stewardship of the Restoration Projects,  
3 as that term is defined, solely for the purpose of the Stewardship of the Restoration  
4 Projects.  
5

6 54. Settling Defendant shall avoid taking any action that is inconsistent with  
7 this Consent Decree or that would adversely affect Project One.  
8

9 **B. Settling Defendant's Impact on Restoration Projects**

10 55. In the event Settling Defendant's use of or failure to maintain a  
11 Restoration Project Site adversely affects the ecological function of a Restoration  
12 Project, Settling Defendant shall, within one hundred eighty (180) days of receipt  
13 of written notification by the Trustees, restore or replace such ecological function  
14 of the Restoration Project. In the event that Settling Defendant fails to do so  
15 within one hundred eighty (180) days of such notification, Settling Defendant will  
16 provide an equal number of DSAYs that were lost as a consequence of Settling  
17 Defendant's actions or omissions. The determination as to the number of DSAYs  
18 lost will be at the unreviewable discretion of the Trustees. Settling Defendant may  
19 use credits derived from other Restoration Projects to provide the lost DSAYs. In  
20 the alternative to providing lost DSAYs through habitat restoration along the LDW  
21 or purchasing credits from a Restoration Project, Settling Defendant may provide  
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1 funds to the Trustees in the amount of \$125,000 for each lost DSAY. The decision  
 2 whether to allow the Settling Defendant to provide habitat restoration along the  
 3 LDW, purchase Bluefield credits from a Restoration Project or to assess \$125,000  
 4 for each unrealized DSAY will remain in the sole and unreviewable discretion of  
 5 the Trustees; PROVIDED that if Settling Defendant's cost of performing habitat  
 6 restoration along the LDW would exceed \$125,000 per DSAY, then the Trustees  
 7 shall direct Settling Defendant to compensate for the lost DSAYs by either  
 8 purchasing the quantity of DSAYs lost, or paying to the Trustees \$125,000 for  
 9 each lost DSAY.

### 13 **C. Settling Defendant: Past Cost Reimbursement**

14  
 15 56. Within forty-five (45) days of the Effective Date, Settling Defendant  
 16 will pay to the Trustees sums totaling \$91,339.04 in damage assessment costs  
 17 through the Effective Date. These sums shall be paid in the following amounts and  
 18 particulars:

19  
 20 Trustee: National Oceanic and Atmospheric Administration  
 21 Amount: \$73,997.74

22  
 23 Trustee: U.S. Department of the Interior  
 24 Amount: \$12,045.71

25 Payments to NOAA and the U.S. Department of the Interior shall be made by  
 26 FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice  
 27

1 account in accordance with current EFT procedures. Payment shall be made in  
 2 accordance with instructions provided to Settling Defendant by the Financial  
 3 Litigation Unit of the U S. Attorney's Office of the Western District of  
 4 Washington. Any payments received by the Department of Justice after 4:00 p.m.  
 5 Eastern Standard Time shall be credited on the next business day. Settling  
 6 Defendant shall provide at least five days' notice to the Financial Litigation Unit  
 7 before making the transfer. Payments to the other Trustees shall be made by  
 8 certified checks, bearing the notation "City of Seattle – Lower Duwamish  
 9 Waterway Assessment" in the amounts indicated and made payable and addressed  
 10 as follows:  
 11

12  
 13  
 14  
 15 Trustee: State of Washington  
 16 Amount: \$3,404.04  
 17 Payee: State of Washington/Department of Ecology  
 18 Address: State of Washington/Department of Ecology  
 19 Attention: Fiscal Office  
 20 P.O. Box 47611  
 21 Lacey, WA 98504-7611

22 Trustee: Suquamish Tribe  
 23 Amount: \$1,891.55  
 24 Payee: Suquamish Tribe  
 25 Address: Melody Allen  
 26 Suquamish Tribe  
 27 Legal Department  
 28 P.O. Box 498  
 Suquamish, WA 98392-0498

57. At the time of each payment Settling Defendant will send notice that payment has been made to the Trustees and DOJ in accordance with Section XIX (Notices and Submissions). Such notice will reference Lower Duwamish Waterway NRDA, DOJ case number 90-11-3-07227/2, and the civil action number.

### IX. FORCE MAJEURE

58. “Force majeure,” for purposes of Settling Defendant’s and Bluefield’s obligations under this Consent Decree, is defined as any event arising from causes beyond the control of the Party claiming Force Majeure (“Claiming Party”) (including Claiming Party’s contractors and sub-contractors, and any other entity controlled by Bluefield or the City of Seattle) that delays or prevents the performance of any obligation under this Consent Decree despite the Claiming Party’s best efforts to fulfill the obligation. The requirement that the Claiming Party exercises “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and use best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. “Force majeure” does not include financial inability to fulfill the obligation. The requirement that the Claiming Party exercises “best efforts to

1 fulfill the obligation” also includes, where necessary, the filing of legal actions to  
2 compel contract performance in accordance with the design and schedule approved  
3 by the Trustees herein.  
4

5           a.     If any event occurs or has occurred that may delay the  
6 performance of any obligation under this Consent Decree, whether or not caused  
7 by a force majeure event, the Claiming Party shall notify the Trustees within  
8 fourteen (14) days of when the Claiming Party first knew that the event might  
9 cause a delay. Within thirty (30) days after notifying the Trustees, the Claiming  
10 Party shall provide a written explanation and description of the reasons for the  
11 delay; the anticipated duration of the delay; all actions taken or to be taken to  
12 prevent or minimize the delay; a schedule for implementation of any measures to  
13 be taken to prevent or mitigate the delay or the effect of the delay; and the rationale  
14 for attributing such delay to a force majeure event (if the Claiming Party intends to  
15 assert such a claim). The Claiming Party shall include with any notice all available  
16 documentation supporting its claim that the delay was attributable to a force  
17 majeure event. Failure to comply with the above requirements will preclude the  
18 Claiming Party from asserting any claim of force majeure for that event.  
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25           b.     If the Trustees agree that the delay or anticipated delay is  
26 attributable to a force majeure event, the time for performance of the obligations  
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1 under this Consent Decree that are affected by the force majeure event will be  
2 extended by the Trustees for such time as is necessary. An extension of the time  
3 for performance of the obligations affected by the force majeure event shall not, of  
4 itself, extend the time for performance of any other obligation. If the Trustees do  
5 not agree that the delay or anticipated delay has been or will be caused by a force  
6 majeure event, the Trustees will notify the Claiming Party in writing of their  
7 decision.  
8

9  
10 c. If the Claiming Party elects to invoke the Dispute Resolution  
11 procedures set forth in Section X regarding a claimed force majeure event, it shall  
12 do so no later than thirty (30) days after receipt of the Trustees' notice of  
13 disagreement. In any such proceeding the Claiming Party shall have the burden of  
14 demonstrating by a preponderance of the evidence that the delay or anticipated  
15 delay has been or will likely be caused by a force majeure event, that the duration  
16 of the delay or the extension sought was or will be warranted under the  
17 circumstances, that the Claiming Party exercised best efforts to fulfill the  
18 obligation in question, that best efforts were exercised to avoid and mitigate the  
19 effects of the delay, and that the Claiming Party complied with the requirements of  
20 this Paragraph. If the Claiming Party carries this burden, the delay at issue shall be  
21  
22  
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1 deemed not to be a violation by the Claiming Party of the affected obligation of  
2 this Consent Decree.

### 3 4 **X. DISPUTE RESOLUTION**

5 59. Unless otherwise expressly provided for in this Consent Decree, the  
6 Dispute Resolution procedures of this Section shall be the exclusive mechanism to  
7  
8 resolve disputes arising under or with respect to this Consent Decree.

9 60. Any dispute which arises under or with respect to this Consent  
10 Decree shall in the first instance be the subject of informal negotiations between  
11 the Trustees and Settling Defendant and/or Bluefield. The period for informal  
12 negotiations shall not exceed twenty-one (21) days from the time the dispute arises,  
13 unless the parties to the dispute agree otherwise in writing. The dispute shall be  
14  
15 considered to have arisen when the Trustees send Settling Defendant or Bluefield a  
16  
17 written notice specifying the nature of the dispute and requested relief (“Notice of  
18 Dispute”), or Settling Defendant or Bluefield sends the Trustees a written Notice of  
19 Dispute.  
20  
21

22 61. a. If the Parties cannot resolve a dispute by informal negotiations  
23 within twenty-one (21) days as set forth under the preceding Paragraph, then the  
24 position advanced by the Trustees shall be considered binding unless, within  
25 twenty-one (21) days after the conclusion of the twenty-one (21) day informal  
26  
27

1 negotiation period (i.e. forty-two (42) days after the date of the Notice of Dispute),  
2 Settling Defendant or Bluefield invokes the formal dispute resolution procedures  
3 of this Section by serving on the Trustees a written Statement of Position on the  
4 matter in dispute, including, but not necessarily limited to, any factual data,  
5 analysis or opinion supporting that position and any supporting documentation  
6 relied upon by Settling Defendant or Bluefield.  
7

9           b.       Within twenty-one (21) days after receipt of Settling  
10 Defendant's or Bluefield's Statement of Position, the Trustees shall serve on  
11 Settling Defendant or Bluefield their written Statement of Position, including, but  
12 not necessarily limited to, any factual data, analysis or opinion supporting that  
13 position and all supporting documentation relied upon by the Trustees. Within  
14 twenty-one (21) days after receipt of the Trustees' Statement of Position, Settling  
15 Defendants or Bluefield may submit a Reply.  
16

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

21           d.       The Trustees' Statement of Position shall be binding upon  
22 Settling Defendant and Bluefield unless, within twenty-one (21) days after receipt  
23 of the Trustees' Statement of Position, Settling Defendant or Bluefield file with the  
24

1 Court and serve on the parties in accordance with Section XIX (Notices and  
2 Submissions) a motion for judicial review of the decision setting forth the matter in  
3 dispute, the efforts made by the parties to resolve it, the relief requested, and the  
4 schedule, if any, within which the dispute must be resolved to ensure orderly  
5 implementation of the Consent Decree. The motion shall also include any  
6 supporting factual data, analysis, opinion, or documentation. The Trustees may  
7 file a response to Settling Defendant's or Bluefield's motion, and Settling  
8 Defendant or Bluefield may file a reply, in accordance with the schedule set forth  
9 in the Local Rules for the Western District of Washington. The foregoing sentence  
10 notwithstanding, the Parties acknowledge that disputes may arise that require  
11 judicial resolution on an expedited basis. In such cases, the Parties shall agree on  
12 an expedited schedule or, absent prompt agreement, any Party to the dispute may  
13 petition the Court for the imposition of an expedited schedule.  
14

15 e. The Court may rule based on the administrative record  
16 (including the Trustees' Statement of Position), with or without oral argument, and  
17 shall review the Trustees' Statements of Position or its resolution of the dispute  
18 under the standards of the Administrative Procedures Act.

19 f. Except as expressly stated elsewhere in this Consent Decree,  
20 any matter in dispute shall be reviewable by this Court.  
21  
22  
23  
24

62. The invocation of formal Dispute Resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Settling Defendant or Bluefield under this Consent Decree, not directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated Penalties with respect to the disputed matter shall continue to accrue, but payment otherwise required under Section XI shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, Stipulated Penalties shall continue to accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant or Bluefield does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Sections XI. In the event that Bluefield does not prevail on the disputed issue, the Trustees may, at their discretion and in lieu of Stipulated Penalties, request disbursement from the Escrow Agent of the Performance Guarantee attached to this Consent Decree as Appendix E1 or from the financial institution providing the Performance Guarantees attached to this Consent Decree as Appendix E2, as applicable, provided that the subject dispute relates to Bluefield's failure to perform the operation and maintenance or adaptive management of Restoration Project One in accordance with Appendix A.

## XI. STIPULATED PENALTIES

63. Settling Defendant and Bluefield shall be liable for stipulated penalties for failure to comply with the requirements of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). In the event that Settling Defendant or Bluefield fails to meet a requirement in this Decree (subject to any modifications agreed to under Section XXII) and any delay is not excused through operation of the provisions of Section IX (Force Majeure), then Settling Defendant or Bluefield (“non-compliant Party”) shall pay stipulated penalties per violation per day as follows:

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

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

b. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Following the Trustees’ determination that a Party has failed to comply

1 with a requirement of this Consent Decree, the Trustees may give the non-  
2 compliant Party written notification of the same and describe the noncompliance.  
3  
4 The Trustees may send the non-compliant Party a written demand for the payment  
5 of the penalties. However, penalties shall accrue as provided in the preceding  
6 Paragraph regardless of whether the Trustees have notified the non-compliant  
7 Party of the violation.  
8

9           c.       Payments under this Section shall be made as follows: 40% of  
10 the total to the United States; 20% of the total to the State; 20% of the total to the  
11 Suquamish Tribe; and 20% of the total to the Muckleshoot Indian Tribe. Payments  
12 under this Section shall be made using the procedures for Past Cost  
13 Reimbursement in Paragraphs 56 and 57.  
14

15           d.       All penalties accruing under this Section shall be due and  
16 payable within thirty (30) days of the non-compliant Party's receipt from the  
17 Trustees of a demand for payment of the penalties, unless the non-compliant Party  
18 invokes the Dispute Resolution procedures under Section X (Dispute Resolution).  
19

20           e.       The non-compliant Party may dispute the Trustees' right to the  
21 penalties identified under Subparagraph a above by invoking the procedures of  
22 Section X (Dispute Resolution). The payment of penalties shall not alter in any  
23 way the non-compliant Party's other obligations under this Consent Decree  
24  
25  
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1           64. Penalties shall continue to accrue as provided in Paragraph 63 during  
2 any dispute resolution period, but need not be paid until the following:

3           a.     If the dispute is resolved by agreement or by a decision of the  
4 Trustees that is not appealed to this Court, accrued penalties determined to be  
5 owing shall be paid to the Trustees within fifteen (15) days of the agreement or the  
6 receipt of the Trustees' decision or order;  
7

8           b.     If the dispute is appealed to this Court and the Trustees prevail  
9 in whole or in part, the non-compliant Party shall pay all accrued penalties  
10 determined by the Court to be owed to the Trustees within sixty (60) days of  
11 receipt of the Court's decision or order, except as provided in Subparagraph c  
12 below;  
13

14           c.     If the District Court's decision is appealed by any Party, the  
15 non-compliant Party shall pay all accrued penalties determined by the District  
16 Court to be owing to the Trustees into an interest-bearing escrow account within  
17 sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid  
18 into this account as they continue to accrue, at least every sixty (60) days. Within  
19 fifteen (15) days of receipt of the final appellate court decision, the escrow agent  
20 shall pay the balance of the account to the Trustees as described in Paragraph 63,  
21 or to Settling Defendant or Bluefield to the extent that they prevail.  
22  
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1           65. If the non-compliant Party fails to pay stipulated penalties when due,  
2 Plaintiffs may institute proceedings to collect the penalties, as well as interest. The  
3 non-compliant Party shall pay Interest on the unpaid balance as provided in  
4 Paragraph 69, which shall begin to accrue on the date of demand made pursuant to  
5 Paragraph 63.  
6

7  
8           66. If the Plaintiffs bring a motion or a separate action in court to enforce  
9 this Decree and prevail, Plaintiffs shall be entitled to recover from the non-  
10 compliant Party their reasonable costs of such motion or action, including but not  
11 limited to costs of attorney time.  
12

13           67. Payments made under this Section are in addition to any other remedies  
14 or sanctions available to Plaintiffs by virtue of the non-compliant Party's failure to  
15 comply with the requirements of this Decree, except in the event that Trustees elect  
16 to exercise a Performance Guarantee pursuant to Section VII. If the Trustees elect  
17 to exercise a Performance Guarantee, the Trustees will not enforce the stipulated  
18 penalties to the extent the stipulated penalties are assessed on the same basis as the  
19 Performance Guarantee is exercised.  
20  
21

22  
23           68. Notwithstanding any other provision of this Section, Plaintiffs may, in  
24 their unreviewable discretion, waive payment of any portion of the stipulated  
25 penalties that have accrued pursuant to this Decree. Payment of stipulated  
26  
27



1 penalties does not excuse Settling Defendant or Bluefield from payment as  
2 required by Sections VII and VIII or from performance of any other requirement of  
3 this Consent Decree.  
4

## 5 **XII. FAILURE TO MAKE TIMELY PAYMENTS**

6 69. If Bluefield or Settling Defendant fails to make any payment pursuant  
7  
8 to this Consent Decree by the required due date, interest shall be assessed at the  
9 rate specified for interest on investments of the EPA Hazardous Substance  
10 Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of  
11 each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest  
12 is the rate in effect at the time the interest accrues. The rate of interest is subject to  
13 change on October 1 of each year. Interest on late payments shall accrue  
14 beginning on the date of entry of the Consent Decree through the date on which the  
15 payment is made.  
16  
17  
18

## 19 **XIII. ACCESS TO INFORMATION AND PROJECT SITE**

20 70. To facilitate the Trustees' oversight responsibilities, Settling  
21 Defendant and Bluefield will provide the Trustees full access to the Restoration  
22 Projects for purposes of inspecting or observing Bluefield's progress in  
23 implementing the Projects.  
24  
25  
26  
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1           71. Commencing upon the date of lodging of this Consent Decree,  
2 Settling Defendant and Bluefield agree to provide the Trustees and their  
3 contractors' access at all reasonable times to the Restoration Project Sites and to  
4 any property under the control of Settling Defendant and Bluefield to which access  
5 is required for the oversight or implementation of any Restoration Project. Each  
6 Trustee shall have the authority to enter any Restoration Project Site at any  
7 reasonable time, and move about such properties in a reasonable manner, including  
8 compliance with all safety requirements, for the purposes of overseeing the  
9 requirements of the Restoration Projects, including, but not limited to:

- 10           a. Monitoring and assessing progress on the planning,  
11 development, maintenance and monitoring of the Projects;  
12           b. Verifying any data or information submitted to the Trustees;  
13           c. Inspecting and copying records, operation logs, contracts or  
14 other documents maintained or generated by Bluefield or its contractors hereafter  
15 retained to perform work undertaken pursuant to any Restoration Project; and  
16           d. Conducting such tests, investigations or sample collections as  
17 deemed necessary to monitor compliance with any Restoration Project, investigate  
18 or assess contamination at or near the Restoration Project Sites, or to assist in  
19 further identifying and quantifying natural resource injuries requiring restoration  
20  
21  
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1 actions and in planning and carrying out further restoration actions. Settling  
 2 Defendant shall be provided with copies of all data, sampling results and  
 3 reports/documentation of any tests, investigations or sampling conducted under  
 4 this Paragraph provided it is not otherwise privileged.  
 5

6 72. Plaintiffs may direct that Bluefield use a camera, sound recording  
 7 device or other type of equipment to record the work done on any Restoration  
 8 Project or injury to natural resources and provide copies of any such recordings to  
 9 the Trustees and Settling Defendant provided it is not otherwise privileged.  
 10 Bluefield may retain a copy of any such photographs or video recordings. Trustees  
 11 may also use their own camera, sound recording device, or other type of equipment  
 12 to record the work done for any Restoration Project or injury to natural resources.  
 13 Settling Defendant shall be provided with a copy of any such recordings made by  
 14 the Trustees provided it is not otherwise privileged.  
 15  
 16  
 17  
 18

#### 19 **XIV. COVENANT NOT TO SUE BY PLAINTIFFS**

20 73. Except as specifically provided in Section XV (Reservations of  
 21 Rights) below, Plaintiffs covenant not to sue or to take administrative action  
 22 against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. §  
 23 9607(a); Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33  
 24 U.S.C. § 1321; Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C.  
 25  
 26  
 27

§ 2702(a); or any applicable tribal law, to recover Covered Natural Resource Damages. This Covenant Not to Sue will take effect upon Settling Defendant's complete payment of costs pursuant to Section VIII.C (Settling Defendant: Past Cost Reimbursement) and continue in effect conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendant and its successors and assigns, and does not extend to any other person.

## XV. RESERVATIONS OF RIGHTS

74. Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiffs in Section XIV. Notwithstanding any other provision of this Consent Decree, Plaintiffs reserve all rights against Settling Defendant with respect to:

- a. liability for costs of response incurred or to be incurred by Plaintiffs under any federal or State statute;
- b. liability for damages to natural resources (including assessment costs) as in defined 42 U.S.C. §§ 9601(6) & (16) that are not expressly included within the Covenant Not to Sue by Plaintiffs in Section XIV;

1           c.       liability for damages to natural resources (including assessment  
2 costs) as in defined 42 U.S.C. §§ 9601(6) & (16) within the Lower Duwamish  
3 Waterway or Elliott Bay resulting from new releases of hazardous substances or  
4 pollutants from Settling Defendant's operations after the Effective Date of this  
5 Consent Decree, or resulting from the Settling Defendant's transportation,  
6 treatment, storage, or disposal, or the arrangement for the transportation, treatment,  
7 storage, or disposal of hazardous substances or pollutants at or in connection with  
8 the Lower Duwamish Waterway, after signature of this Consent Decree;  
9  
10

11           d.       liability for injunctive relief or administrative order  
12 enforcement under any federal or State statute;  
13  
14

15           e.       liability for costs incurred or to be incurred by the Agency for  
16 Toxic Substances and Disease Registry in or regarding the Lower Duwamish  
17 Waterway or Elliott Bay;  
18

19           f.       additional claims for Covered Natural Resource Damages if  
20 conditions, factors or information in the Lower Duwamish Waterway or Elliott  
21 Bay, not known to the Trustees as of the Effective Date, are discovered that,  
22 together with any other relevant information, indicate that there is a threat to the  
23 environment, or injury to, destruction of, or loss of natural resources of a type  
24 unknown, or of a magnitude significantly greater than was known, as of the  
25  
26  
27

1 Effective Date (for purposes of this Subparagraph, information known to the  
2 Trustees shall consist of any information in the files of, or otherwise in the  
3 possession of any one of the individual Trustees, or their contractors or consultants  
4 who worked on the Trustees' natural resource damages assessment and liability  
5 allocation projects);  
6

7  
8 g. criminal liability to the United States or State; and

9 h. claims in this action or in a new action based on a failure of  
10 Settling Defendant to satisfy the requirements of this Consent Decree.  
11

## 12 **XVI. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

13 75. Settling Defendant covenants not to sue and agrees not to assert any  
14 claims or causes of action against the United States, the State, the Suquamish  
15 Tribe, and the Muckleshoot Indian Tribe, or their contractors or employees,  
16 relating to Covered Natural Resource Damages. Settling Defendant reserves, and  
17 this Consent Decree is without prejudice to, all rights with respect to all matters not  
18 expressly included within this Covenant Not to Sue, including all rights with  
19 respect to all matters reserved in Section XV (Reservation of Rights).  
20  
21  
22

## 23 **XVII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

24 76. Nothing in this Consent Decree shall be construed to create any rights  
25 in, or grant any cause of action to, any person not a Party to this Consent Decree.  
26  
27

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

16 77. The Parties agree, and by entering this Consent Decree this Court  
17 finds, that this settlement constitutes a judicially-approved settlement for purposes  
18 of Section 113(f)(2), and that Settling Defendant is entitled, as of the Effective  
19 Date of this Consent Decree, to protection from contribution actions or claims as  
20 provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW  
21 70.105D.040(4)(d), or as may be otherwise provided by law, for Covered Natural  
22 Resource Damages; provided, however, that if Plaintiffs exercise their rights under  
23 the reservations in Section XV, other than in Paragraphs 74(g) (criminal liability)  
24  
25  
26  
27

1 and 74(h) (failure to satisfy a requirement of this Consent Decree), the contribution  
2 protection afforded by this Consent Decree will no longer include those matters  
3 that are within the scope of the exercised reservation.  
4

5 78. Settling Defendant agrees that it will notify the Trustees and the  
6 United States in writing no later than sixty (60) days before bringing a suit or claim  
7 for contribution for Covered Natural Resource Damages. Settling Defendant also  
8 will notify the Trustees of any settlement of its claims (regardless of whether the  
9 claim is filed or unfiled) for contribution for Covered Natural Resource Damages.  
10 Settling Defendant also agrees that it will notify the Trustees and the United States  
11 in writing within ten (10) days of service of a complaint or claim upon Settling  
12 Defendant relating to a suit or claim for contribution for Covered Natural Resource  
13 Damages. In addition, Settling Defendant will notify the Trustees and the United  
14 States within ten (10) days of service or receipt of any Motion for Summary  
15 Judgment and within ten (10) days of receipt of any order from a court setting a  
16 case for trial for matters related to this Decree.  
17  
18  
19  
20  
21

22 79. In any subsequent administrative or judicial proceeding initiated by  
23 Plaintiffs for injunctive relief, recovery of response costs, or other appropriate  
24 relief other than Covered Natural Resource Damages, Settling Defendant shall not  
25 assert, nor may it maintain, any defense or claim based upon the principles of  
26  
27



1 waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other  
2 defenses based upon any contention that the claims raised by Plaintiffs in the  
3 subsequent proceeding were or should have been brought in the instant case;  
4 provided, however, that nothing in this Paragraph affects the enforceability of the  
5 Covenants Not to Sue set forth in Sections XIV and XVI.  
6

### 7 **XVIII. RETENTION OF RECORDS**

8  
9 80. Until ten (10) years after Settling Defendant's and Bluefield's receipt  
10 of the Trustees' notification pursuant to Paragraph 16 (Approval of Completion of  
11 Vegetation and Habitat Development And Monitoring Obligations), Settling  
12 Defendant and Bluefield shall preserve and retain all non-identical copies of  
13 records and documents (including records or documents in electronic form) now in  
14 their possession or control or which come into its possession or control that relate  
15 in any manner to its liability under CERCLA with respect to the Lower Duwamish  
16 Waterway. Settling Defendant and Bluefield must also retain, and instruct their  
17 respective contractors and agents to preserve, for the same period of time specified  
18 above all non-identical copies of the last draft or final version of any documents or  
19 records (including documents or records in electronic form) now in their  
20 possession or control or which come into their possession or control that relate in  
21 any manner to the performance of the Project, provided, however, that Settling  
22  
23  
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1 Defendant and Bluefield (and their contractors and agents) must respectively  
2 retain, in addition, copies of all data generated during the performance of the Work  
3 and not contained in the aforementioned documents required to be retained. Each  
4 of the above record retention requirements shall apply respectively and  
5 individually to Settling Defendant and Bluefield, regardless of any corporate  
6 retention policy to the contrary.  
7  
8

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

82. Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after a reasonable inquiry that fully complies with the Federal Rules of Civil Procedure, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by any Trustee.

### **XIX. NOTICES AND SUBMISSIONS**

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

As to the United States and as to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611

1 Washington, D.C. 20044-7611  
2 (DJ #90-11-3-07227/2)

3 Michael J. Zevenbergen  
4 U.S. Department of Justice  
5 c/o NOAA/Damage Assessment  
6 7600 Sand Point Way, NE  
7 Seattle, WA 98115

8 As to NOAA:

9 Laurie Lee  
10 NOAA Office of General Counsel  
11 501 W. Ocean Blvd., Suite 4470  
12 Long Beach, CA. 90802

13 As to the United States Department of the Interior:

14 Deirdre Donahue  
15 U.S. Department of the Interior  
16 Office of the Solicitor  
17 601 SW 2<sup>nd</sup> Avenue, Suite 1950  
18 Portland, OR 97204

19 Jeff Krausmann  
20 U.S. Fish & Wildlife Service  
21 510 Desmond Dr. SE, Suite 102  
22 Lacey, WA 98503-1263

23 As to the State:

24 Donna Podger  
25 Toxics Cleanup Program  
26 State of Washington  
27 P.O. Box 47600  
28 Olympia, WA 98504-7600

CONSENT DECREE

1 As to the Suquamish Tribe:

2 Melody Allen  
3 Suquamish Tribe  
4 Legal Department  
5 P.O. Box 498  
6 Suquamish, WA 98392-0498

7 As to the Muckleshoot Indian Tribe:

8 Mr. Robert L Otsea, Jr.  
9 Office of the Tribal Attorney  
10 Muckleshoot Indian Tribe  
11 39015 172nd Avenue S.E.  
12 Auburn, WA 98002

13 As to Settling Defendant:

14 Pete Rude  
15 PO Box 34018  
16 Seattle, WA 98124-4018  
17 pete.rude@seattle.gov

18 Laura Wishik, Assistant City Attorney  
19 City of Seattle  
20 600 Fourth Avenue, 4<sup>th</sup> Floor  
21 P.O. Box 94769  
22 Seattle, WA 98124-4769  
23 laura.wishik@seattle.gov

24 As to Bluefield:

25 Kevin P. Tierney  
26 General Counsel  
27 EarthCon Consultants, Inc. (on behalf of Bluefield Holdings, Inc.)  
28 1880 West Oak Parkway, Suite 106  
Marietta, GA 30062

**XX. RETENTION OF JURISDICTION**

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

**XXI. INTEGRATION/APPENDICES**

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

Appendix A = Project Scope of Work

Appendix B = Legal Description of Restoration Project One

1 Appendix C = Master Lease Agreement

2 Appendix D = Environmental Covenants

3 Appendix E1 = Maintenance Performance Guarantee (Escrow Agreement)

4 Appendix E2 = Adaptive Management Performance Guarantee (Letter of Credit)

5 Appendix F = Legal Description and/or Identification of Released Facilities

6  
7  
8 **XXII. MODIFICATION**

9 86. No material modifications shall be made to any requirement under  
10 this Consent Decree without written notification to and written approval of the  
11 United States Department of Justice and the Trustees, Settling Defendant,  
12 Bluefield, and the Court. Modifications to this Consent Decree exclusive of the  
13 appendices incorporated within that do not materially alter the terms of this  
14 Consent Decree may be made by written agreement between the United States  
15 Department of Justice, the Trustees, Settling Defendant, and/or Bluefield.  
16 Modifications to any of the appendices to this Consent Decree that do not  
17 materially alter any of the terms of this Consent Decree may be made by written  
18 agreement between the Trustees, Settling Defendant, and/or Bluefield.  
19  
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23 **XXIII. ENFORCEMENT**

24 87. The requirements of this Consent Decree, including but not limited to  
25 deadlines, schedules and Project designs, are independently enforceable. Any  
26  
27

1 delay or failure of the Trustees to enforce any requirement will not preclude or  
2 prejudice the subsequent enforcement of the same or another requirement.

3 **XXIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**  
4

5 88. This Decree will be lodged with the Court for a period of not less  
6 than thirty (30) days for public notice and comment. Plaintiffs each reserve the  
7 right to withdraw or withhold their consent if the comments regarding the Decree  
8 disclose facts or considerations that indicate this Decree is inappropriate, improper,  
9 or inadequate. Settling Defendant and Bluefield consent to the entry of this Decree  
10 without further notice.  
11

12 89. If for any reason this Court does not approve this Decree in the form  
13 presented, this Decree may be voided at the sole discretion of any Party, and the  
14 terms of the agreement may not be used as evidence in any litigation among the  
15 Parties.  
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19 **XXV. SIGNATORIES/SERVICE**  
20

21 91. The Assistant Attorney General for the Environment and Natural  
22 Resources Division of the United States Department of Justice and each  
23 undersigned representative of the State, the Suquamish Tribe, the Muckleshoot  
24 Indian Tribe, Settling Defendant, and Bluefield certifies that he or she is authorized  
25 to enter into the terms and conditions of this Decree and to execute and bind  
26  
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1 legally the Party that he or she represents to this document.

2       92. Settling Defendant and Bluefield agree not to oppose entry of this  
3 Decree by this Court or to challenge any provision of this Decree unless any  
4 Plaintiff has notified Settling Defendant and Bluefield in writing that it no longer  
5 supports entry of the Decree.  
6

7       93. Settling Defendant and Bluefield will identify on the attached  
8 signature page the name and address of an agent who is authorized to accept  
9 service of process by mail on behalf of each of them with respect to all matters  
10 relating to this Decree. Settling Defendant and Bluefield agree to accept service in  
11 that manner and to waive the formal service requirements set forth in Rule 4 of the  
12 Federal Rules of Civil Procedure and any applicable local rules of this Court,  
13 including but not limited to service of a summons. Settling Defendant need not file  
14 an answer to the complaint in this action unless or until the Court expressly  
15 declines to enter this Decree.  
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## 20                                   XXVI. FINAL JUDGMENT

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

2 SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, \_\_\_\_\_.  
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6 \_\_\_\_\_  
JAMES L. ROBART  
7 UNITED STATES DISTRICT JUDGE  
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28 CONSENT DECREE

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE UNITED STATES OF AMERICA:**

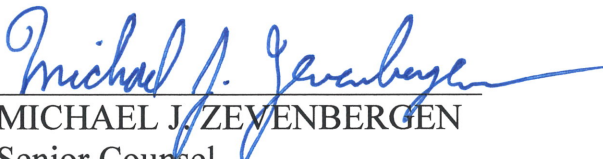
ASSISTANT ATTORNEY GENERAL  
Environment & Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: 11/12/20



ERIKA M. WELLS  
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

Date: Nov. 12, 2020



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

CONSENT DECREE

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE STATE OF WASHINGTON:**

Date: 8/11/2020

 E-Signature

Rebecca S. Lawson, P.E., LHG  
Acting Program Manager  
Department of Ecology

Date: 8/13/2020

 E-Signature

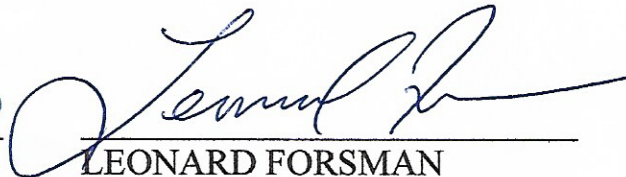
NELS JOHNSON  
Assistant Attorney General  
State of Washington

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE SUQUAMISH TRIBE:**

Date:

10/1/2020



LEONARD FORSMAN

Chairman

Suquamish Tribe


Post Office Box 498

Suquamish, Washington 98392

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE MUCKLESHOOT INDIAN TRIBE:**

Date: 5/21/20

  
JAISON ELKINS  
Chairman  
Muckleshoot Indian Tribe  
39015 172<sup>nd</sup> Ave. S.E.  
Auburn, WA 98092-9763

CONSENT DECREE

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U. S. DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
7600 Sand Point Way NE  
Seattle, WA 98115

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR THE SETTling DEFENDANT:**

**CITY OF SEATTLE**

Date: 5/15/20

  
JENNY DURKAN  
Mayor

**SEATTLE CITY ATTORNEY**

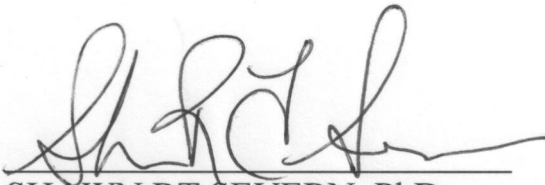
Date: 05/14/2020

  
PETER S. HOLMES

Signature Page for Consent Decree regarding the Lower Duwamish Waterway

**FOR BLUEFIELD HOLDINGS LLC:**

Date: May 14, 2020



SHAWN RT SEVERN, PhD

President

Bluefield Holdings, Inc.

Shawns@bluefieldholdings.com

CONSENT DECREE

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U. S. DEPARTMENT OF JUSTICE  
Environment and Natural Resources Division  
7600 Sand Point Way NE  
Seattle, WA 98115