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PIERCE COUNTY, WASHINGTON

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Kelly Cole
Office of Regional Counsel
U.S. EPA, Region 10
1200 Sixth Ave. ORC -158
Seattle, WA 98101

Document Title: **Restrictive Covenant**
Grantor: **Washington State Department of Natural Resources**
Grantee: **Washington State Department of Ecology**
Legal Description (Brief): **Aquatic lands in a portion of the Thea Foss Waterway within Section 4, T 20 N R 3 E and in Section 33, T 21 N R 3 E.**
Additional Legal Description: **SEE PAGE 2 FOR FULL LEGAL DESCRIPTION**
Assessor's Tax Parcel Number: **N/A**

**Declaration of Restrictive Covenant
For Certain Aquatic Lands Owned by the State of Washington**

This Declaration of Restrictive Covenant is made this 22nd day of September 2007, pursuant to RCW 43.21A.440 and RCW 70.105D.030(1)(f),(g), and (j), by the Washington Department of Natural Resources, acting by and through the Commissioner of Public Lands, ("DNR"), its successors and assigns ("Grantor") and the State of Washington, Department of Ecology, and its successors and assigns ("Grantee" but hereinafter "Ecology") for the benefit of the United States Environmental Protection Agency, its successors and assigns ("EPA"). The restrictions imposed by this covenant are consistent with those required by WAC 173-340-440(8) and (9) under the Model Toxics Control Act ("MTCA").

The property subject to this Restrictive Covenant is the site of a remedial action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9601, *et seq.* The objective of the remedial action is to protect human health and the environment. The property is within the Thea Foss and Wheeler Osgood Waterways Site, which represents three of eight Problem Areas within Operable Unit 01 of the Commencement Bay Nearshore/Tideflats Superfund Site ("CB N/T"). DNR and the United States of America ("USA") entered into a Consent Decree concerning this property in the District Court for the Western District of Washington on December 17, 2003.

The Consent Decree is part of an integrated settlement that includes two other consent decrees with (1) the City of Tacoma and the Funding Defendants ("City"): *United States v. Atlantic Richfield Company, et al.*, in the United States District Court for the Western District of Washington, Civil Action No. C03-5117 RJB. The Consent Decree was entered by the District Court on May 9, 2003, and (2) Puget Sound Energy, Advance Ross Sub Company, and PacifiCorp ("Utilities") recorded with the Pierce County, Washington Auditor's Office (Recording No. 200608250717).

The State of Washington holds legal title to certain aquatic lands in Pierce County, Washington subject to this Restrictive Covenant. Under Revised Code of Washington ("RCW") Title 79 and other constitutional and statutory mandates, DNR is responsible for management of certain state-owned aquatic land. The property subject to this Restrictive Covenant ("Property") is described as follows:

Those aquatic lands situate in the City of Tacoma, Pierce County, State of Washington, more particularly described as follows:

All that portion of the Thea Foss Waterway, formerly known as the City Waterway, lying southerly of a line beginning at the intersection of the westerly Inner harbor line with the southerly boundary of Lot 32, Block 66, as shown on the Map of Tacoma Tidelands Volume 1, April 1895 of record in the offices of the Commissioner of Public Lands, thence northeasterly, perpendicular to said Inner harbor line, to the easterly Waterway line, and lying northerly of a line parallel to and 200' northerly of, as measured perpendicularly to the northerly boundary of the Public Place as shown and platted on the 1994 Supplemental Map of Thea Foss Waterway of record in the offices of the Commissioner of Public Lands, said line to extend from the Inner Harbor line to the opposing Inner Harbor Line, together with those portions of the Harbor Area(s) and Public Place(s) also lying between the afore described lines.

AND

That portion of the Harbor Area lying in front of Lots 2 through 11, inclusive, Block 66, as shown on the 1983 Supplemental Map of City Waterway, Tacoma Tidelands, of record in the offices of the Commissioner of Public Lands, the lateral boundaries of the subject parcel being the northwesterly line of Lot 2 and the southeasterly line of Lot 11 produced northeasterly to intersect with the Outer Harbor Line.

The Property is state-owned aquatic land within DNR's management authority. Therefore, DNR declares that it has authority to enter into this Restrictive Covenant. DNR makes the following declarations as to limitations, restrictions, and uses to which the Property may be put to the extent that DNR has authority to allow or prohibit such uses. DNR intends that such declarations shall constitute covenants that run with the

land, as provided by law, and be binding on all parties and all persons claiming under them, including all future owners or managers of any portion of or interest in the property ("Proprietor").

Section 1. The Property is the site of undisturbed contaminated sediments capped with a layer of clean sediment.

Section 2. Any activity on the Property that may result in the release or exposure to the environment of contaminated sediment or of a hazardous substance that is confined by the remedy, or creates a new exposure pathway, is prohibited unless the proponent of the activity obtains prior written authorization from EPA and secures all necessary local, state, and federal permits and approvals. Activities prohibited unless otherwise approved include; but are not limited to,

- 2.1 Any activity that alters, modifies, or removes remedial measures.
- 2.2 Piling removal and installation.
- 2.3 Dredging and excavation.
- 2.4 Harvesting of shellfish embedded in aquatic lands.

Section 3. Any other activity on the Property that will interfere with the remedial action, or operation, maintenance and monitoring of the remedial action is prohibited without (1) prior written approval of EPA and DNR and (2) prior notice to the City.

Section 4. The Proprietor shall give thirty (30) days advance written notice to the EPA, Ecology, DNR and City of the Proprietor's intent to convey any interest in the Property. No conveyance of title, easement, lease or other interest in the Property shall be consummated by the Proprietor without adequate and complete provision for the continued operation, maintenance, and monitoring of the remedial action as required by the Consent Decree, and for continued compliance with all Consent Decree requirements. Any subsequent Proprietor of the Property shall be bound by the terms of this Restrictive Covenant.

Section 5. The Proprietor shall (1) obtain prior approval from EPA and DNR and (2) notify Ecology and the City before any use of the Property that is inconsistent with the terms of the Restrictive Covenant, or the Consent Decrees. EPA or its successor agency, in its discretion, may approve any inconsistent use only after public notice and comment.

Section 6. The Proprietor shall allow authorized representatives of EPA, Ecology, DNR, and City the right to enter the Property at reasonable times for the purpose of evaluating compliance with the Consent Decree, including the right to take samples, inspect any remedial action taken at the site, confirm compliance with this Restrictive Covenant, and to inspect records as provided by the Consent Decree. EPA, Ecology, and

City shall obtain a right-of-entry use authorization from the Proprietor at least thirty (30) days prior to entry onto the Property. Proprietor shall not charge for access provided for under the Consent Decree.

Section 7. The Proprietor shall restrict leases of the Property to uses and activities consistent with this Restrictive Covenant and shall notify all lessees of the restrictions on the use of the Property. The Proprietor shall include a copy of this Restrictive Covenant in any instrument conveying any interest in any portion of the Property; including title, lease, easement, or other use authorization.

Section 8. Within ten (10) days of the date this Restrictive Covenant is fully executed, DNR shall record this Restrictive Covenant with the Pierce County, Washington Auditor's Office and DNR Lands Records Office. Conformed copies of such recordings shall be forwarded to EPA, Office of Regional Counsel 1200 Sixth Avenue, ORC-158, Seattle, Washington, 98101 and Department of Ecology, Toxics Cleanup Program, Southwest Regional Office, PO Box 47600, Olympia, WA 98504-7600.

Section 9. The Proprietor shall allow entities authorized by law to regulate navigation to place and maintain signs on the Property regarding prohibited activities, vessel size and speed, and Waterway navigational markers. Proprietor shall allow entities authorized by law to place and maintain navigational buoys and navigational visual aids and markers on the Property. Proprietor shall not charge for (1) placement or (2) access to maintain such signs or navigational aids.

Section 10. The Proprietor reserves the right to record an instrument that provides that this Restrictive Covenant shall no longer limit the use of the Property or be of any further force or effect. However, such an instrument may be recorded only if EPA, after public notice and opportunity to comment, concurs.

Section 11. The Proprietor hereby confirms that this Restrictive Covenant is enforceable at law solely by DNR, Ecology, EPA and/or City.

Section 12. The parties who must be notified by the terms of this Covenant are:

State of Washington
Department of Natural Resources
Aquatic Resources Program
1111 Washington St. SE
PO Box 47027
Olympia, Washington 98504-7027

Environmental Protection Agency
Office of Environmental Cleanup
1200 Sixth Avenue
Seattle, WA 98101


State of Washington
Department of Ecology
Toxics Cleanup Program
Southwest Regional Office
PO Box 47600
Olympia, WA 98504-7600

City of Tacoma
Public Works Department
Science and Engineering Division
2201 Portland Avenue
Tacoma, WA 98421-2711

Section 13. The Property is aquatic land subject to other interests arising under treaties, federal and state statutes and the common law, including the Public Trust Doctrine. This Restrictive Covenant does not impose liability on the Proprietor for the acts of others exercising rights under such interests.

Section 14. If Property is used as a place of public access, the Proprietor shall allow the Tacoma-Pierce County Health Department ("TPCHD") to place and maintain multi-lingual signs on Property where appropriate to warn the public about the danger of consuming shellfish harvested from the waterway. Proprietor shall not charge for (1) placement or (2) access to maintain such signs.

FOR THE STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES



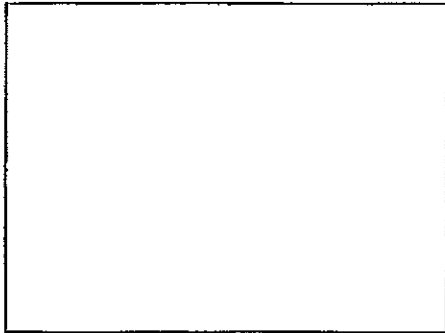
DOUG SUTHERLAND
Commissioner of Public Lands
State of Washington
Department of Natural Resources
P.O. Box 47001
Olympia, Washington 98504-7001



STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

I certify that I know or have satisfactory evidence that **[Grantor(s) Name(s)/Representative(s) Name(s)]** is the person who appeared before me and is the **[Position/Title, if Applicable]** of **[Grantor(s) Name(s)]**, and said person acknowledged that she/he signed this instrument, and acknowledged it to be the free and voluntary act of said entity, for the uses and purposes mentioned in the instrument, and on oath stated that she/he is authorized to execute the said instrument.

SUBSCRIBED and SWORN to before me this ___ day of _____, 200__.



Notary Signature

Print/Type Name

Notary Public for the state of Washington

Residing at

My commission expires

(Use this space for notarial stamp/seal)

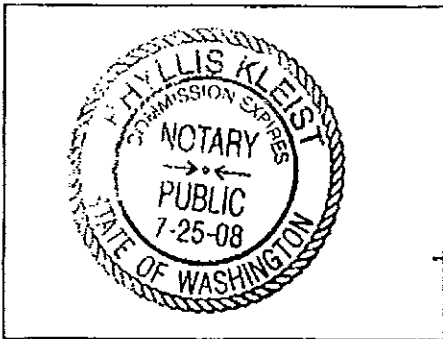
STATE OF WASHINGTON)

COUNTY OF THURSTON)

) ss.
)

I certify that I know or have satisfactory evidence that Doug Sutherland is the person who appeared before me and is the Public Lands Commissioner of Washington State Department of Natural Resources and said person acknowledged that she/he signed this instrument, and acknowledged it to be the free and voluntary act of said entity, for the uses and purposes mentioned in the instrument, and on oath stated that she/he is authorized to execute the said instrument.

SUBSCRIBED and SWORN to before me this 22 day of January 20007.



Notary Signature

Hyllis Kleist

Print/Type Name

Hyllis Kleist
Notary Public for the state of Washington

Residing at

Tacoma

My commission expires

07.25.08