

When Recorded, Return To:

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

23.8.12-3.7  
Alpha

Document Title:	<b>Restrictive Covenant</b>
Grantor:	<b>Foss Waterway Development Authority</b>
Grantee:	<b>WA DEPARTMENT OF ECOLOGY</b>
Legal Description:	<b>ALL THAT PORTION OF BLOCK 51, MAP OF TACOMA TIDE LANDS</b>
Additional Legal Description:	<b>SEE ATTACHMENT 1 FOR FULL LEGAL DESCRIPTION</b>
Assessor's Tax Parcel Number:	<b>8950001572</b>

**RESTRICTIVE COVENANT**

This Restrictive Covenant is made this <sup>29<sup>th</sup></sup> day of January, 2007, pursuant to RCW 43.21A.440 and RCW 70.105D.030(1)(f), (g) and (j), by Foss Waterway Development Authority and its successors and assigns ("Grantor"), and the State of Washington, Department of Ecology, and its successors and assigns ("Grantee" but hereafter "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 340-440(8) and (9) under the Model Toxics Control Act ("MTCA").

A portion of the property referenced above is subject to this Restrictive Covenant because Remedial Action work has been undertaken on the property pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et. seq., under a Consent Decree entered on May 9, 2003, titled *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, ("Consent Decree"). The objective of the Remedial Action undertaken on the property is to protect human health and the environment.

The Consent Decree is part of an integrated settlement that includes two other consent decrees. One is between EPA and Puget Sound Energy, Advance Ross Sub Company and PacifiCorp ("Utilities"), and was entered by the federal District Court on May 9, 2003. The other consent decree is between EPA and the State of Washington, Department of Natural Resources, which was entered by the federal District Court on December 17, 2003.

Grantor is the fee owner of real property (hereafter "Property") that is subject to this Restrictive Covenant, which is legally described in Attachment 1. The Property subject to this Restrictive Covenant is the portion of Tax Parcel 8950001572 that is located at 1616 East "D" Street, Tacoma, in Pierce County, Washington, which is generally depicted by the cross-hatched area on the map attached as Attachment 2. Grantor, as holder of legal title, does hereby declare that is has authority to enter into this Restrictive Covenant.

This Restrictive Covenant is required because Remedial Action capped and/or left residual contamination in place. The purpose of this Restrictive Covenant is to reduce potential exposure of marine organisms to contaminated sediments confined by capping, and to reduce potential exposure of marine organisms to contaminated sediments left in place in the Thea Foss and Wheeler-Osgood Waterways.

Grantor makes the following declarations as to limitations, restrictions, and uses on the Property. Furthermore, it is the intent of Grantor 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 current and future owners of any portion of or interest in the Property.

Section 1. The Remedial Action undertaken on the Property includes a cap (i.e., placement of capping material over contaminated sediment.)

Section 2. Grantor shall not conduct, or allow to be conducted any activity on the Property that may result in the release or exposure to the environment of the hazardous substances contained by the Remedial Action, or that may create a new exposure pathway, unless the proponent of the activity obtains the prior written authorization from EPA and secures all necessary local, state, and federal permits and approvals for the activity in question. Activities prohibited unless otherwise approved include, but are not limited to:

- 2.1 Any activity that alters, modifies, or removes the Remedial Action undertaken on the Property.
- 2.2 Piling removal and installation.
- 2.3 Dredging and excavation.
- 2.4 Harvest of shellfish embedded in aquatic lands.

## 2.5 Anchoring

Section 3. Any other activity on the Property that may interfere with the Remedial Action, Operation and Maintenance, monitoring, or other measures to assure the integrity of the cleanup action and continued protection of human health and the environment is prohibited without prior notice to and approval by EPA.

Section 4. Grantor shall give thirty (30) days advance written notice to EPA and Ecology of Grantor'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 Grantor without adequate and complete provision for the continued compliance with all required institutional controls, including this Restrictive Covenant.

Section 5. Grantor shall notify EPA and Ecology and obtain approval from EPA before any use of the Property that is inconsistent with the terms of the Restrictive Covenant, or the Consent Decree.

Section 6. Grantor shall allow authorized representatives of EPA, Ecology, the City of Tacoma, and the Utilities the right to enter the Property at reasonable times for the purpose of evaluating compliance with the Consent Decree and other required plans, including the right to undertake Operation and Maintenance activities required under the Consent Decree, which includes gathering samples on the Property, and to confirm compliance with this Restrictive Covenant.

Section 7. Grantor 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. Grantor shall include a copy of this Restrictive Covenant in any instrument conveying any interest in any portion of the Property, including conveyance of title, a lease, a license, an easement or other use authorizations.

Section 8. Within ten (10) days of the date this Restrictive Covenant is fully executed, Grantor shall record this Restrictive Covenant with the Auditor's Office, Pierce County, State of Washington. Conformed copies of such recordings shall be forwarded to EPA, Region 10, Office of Regional Counsel at 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. Grantor shall include a copy of this Restrictive Covenant in any instrument conveying any interest in any portion of the Property.

Section 9. If requested by EPA and/or the City of Tacoma, Grantor shall allow, at no cost, the placement and maintenance of signs on the Property regarding prohibited activities, vessel size and speed, and Waterway navigational buoys, markers and visual aids, to the extent such activities do not unreasonably interfere with the public's use and enjoyment of the Property.

Section 10. Grantor 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 concurs.

Section 11. Grantor hereby confirms that this Restrictive Covenant is enforceable at law by EPA and Ecology.

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

Environmental Protection Agency  
Office of Environmental Cleanup  
1200 Sixth Avenue, ECL-111  
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  
Office of City Attorney  
Civil Division  
747 Market Street, Room 1120  
Tacoma, WA 98402-3767

Puget Sound Energy – Thea Foss Waterway Cleanup  
c/o Loren Dunn  
Riddell Williams  
1001 Fourth Avenue  
Suite 4500  
Seattle, WA 98154-1192

PacifiCorp – Thea Foss Waterway Cleanup  
c/o Richard Gleason  
Stoel Rives  
900 SW Fifth Avenue  
Suite 2600  
Portland, OR 97204

If a proposed activity is within state-owned aquatic lands, then notice shall also be provided to:

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

This Restrictive Covenant is executed by:

**Foss Waterway Development Authority**

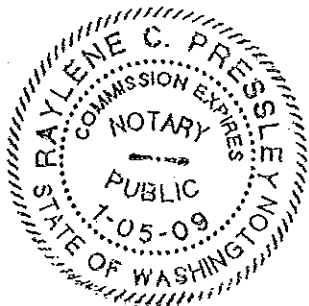
Donald A Meyer

By: Don Meyer  
Its: Executive Director

STATE OF WASHINGTON )  
COUNTY OF PIERCE )

On this 29<sup>th</sup> day of JANUARY, 2007, January, Don Meyer personally appeared before me and on oath acknowledged that he was authorized to sign this instrument as the Executive Director for the Foss Waterway Development Authority, and further acknowledged that his signature was a free and voluntary act on behalf of the Foss Waterway Development Authority, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Raylene C. Presley  
Notary Public in and for the State of  
Washington, residing at PIERCE, WA  
My appointment expires 01/05/2009

## ATTACHMENT 1

### [Legal Description]

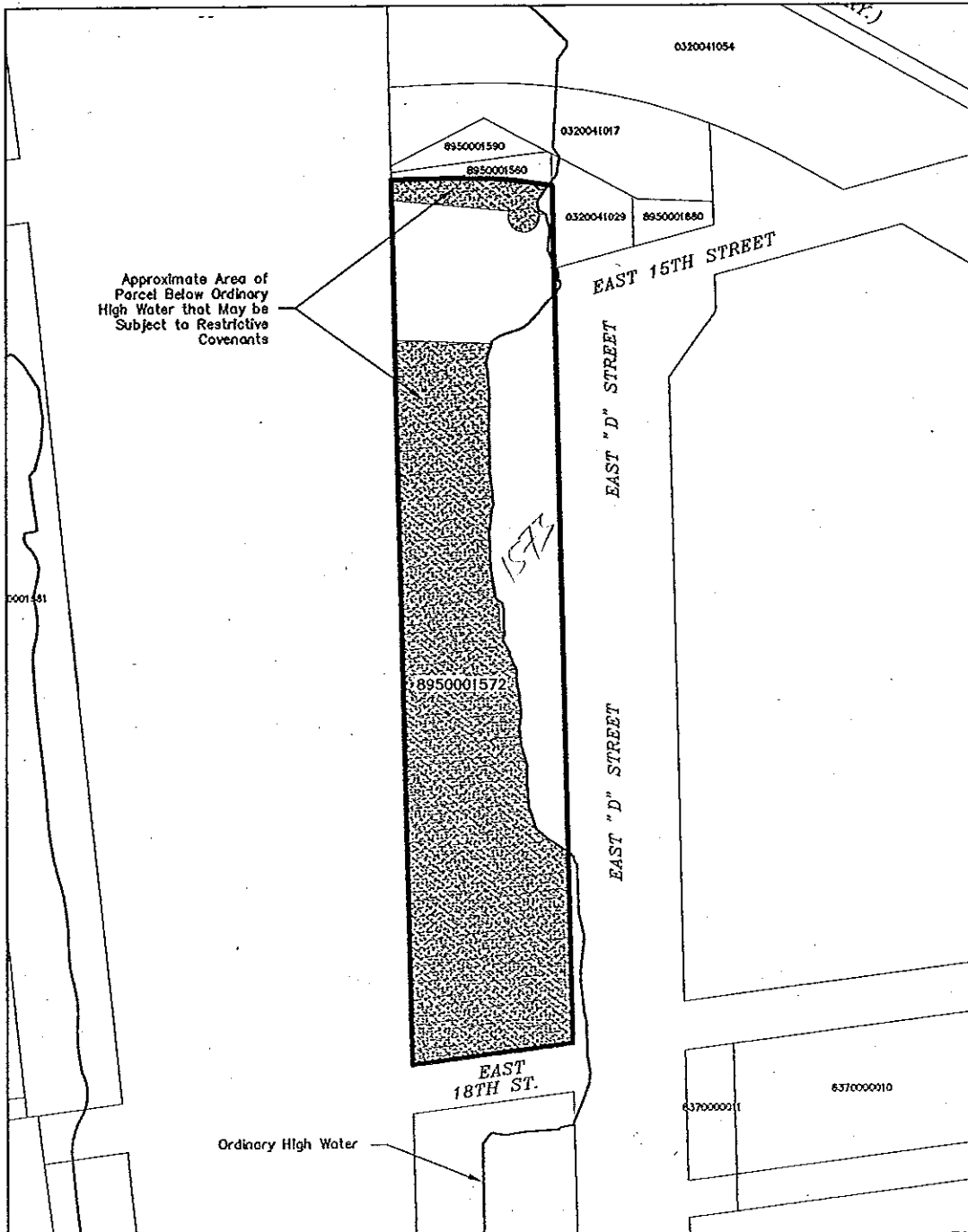
All that portion of Block 51, Map of the Tacoma Tide Lands as surveyed and platted by the Board of Tide Land Appraisers for Pierce County, according to the Plat filed for record September 14, 1895, in the Office of the County Auditor, in Pierce County Washington, described as follows:

Beginning at the intersection of the Northwest corner of East 18<sup>th</sup> Street and the Easterly line of the City Waterway; thence North 01°26'46" West along the Easterly line of said City Waterway a distance of 876 feet; thence North 88°34'41" East a distance of 200 feet; thence Southerly parallel to and 200 feet Easterly of said East line of the City Waterway to a point on the North line of said East 18<sup>th</sup> Street a distance of 201.16 feet to the point of beginning.

**ATTACHMENT 2**

(Map Depicting Area of Property Affected by Restrictive Covenant)

**Auditor's notation  
to facilitate  
scanning process**



Approximate Area of Parcel Below Ordinary High Water that May be Subject to Restrictive Covenants

Ordinary High Water

	DATE	SCALE
	05/2008	1" = 200'
	DESIGNED	DRAWN
	KSS	MLH
CHECKED	PROJECT NAME	
LH		
DRAWING NAME	Foss Restrictive Covenants, Parcel 8950001572	

CITY OF TACOMA  
DEPARTMENT OF PUBLIC WORKS

Foss Restrictive Covenants  
1616 East D Street  
Parcel 8950001572

SHEET NO.  
Sect 1 of 1





"Su Dowie"  
 <sdowie@theafoss.com>  
 04/23/2007 08:12 AM

To Kelly Cole/R10/USEPA/US@EPA,  
 <ldunn@riddellwilliams.com>  
 cc <dmosich@ci.tacoma.wa.us>,  
 <jackie.wetzsteon@pacificcorp.com>,  
 <lorendunn@riddellwilliams.com>, Piper  
 bcc

Subject RE:

History: This message has been forwarded.

Dear Kelley:

On Friday, April 20th the Board of Directors authorized the Executive Director to sign the Restrictive Covenants. As I shared with Jackie Werzsteon of Pacific Corps if we can not have our float system included in an out right allowable use for parcel 4 we would like to at least be provided information on what the process is to obtain approval (beyond the usual permitting requirements). Could you provide that information? We would also appreciate having an idea on a timeline generally associated with the process so we can plan accordingly. Our intent is simply being able to implement the Master Plan for the waterway which includes a float for launching kayaks from parcel 4. Did Jackie share the float design with you that we sent? It does not sit on the cap or use in-water pilings. We will put together a complete package once we know what it is EPA is requiring.

Thanks,  
 Su Dowie

-----Original Message-----

From: Cole.Kelly@epamail.epa.gov [mailto:Cole.Kelly@epamail.epa.gov]  
 Sent: Friday, April 20, 2007 12:29 PM  
 To: ldunn@riddellwilliams.com  
 Cc: dmosich@ci.tacoma.wa.us; jackie.wetzsteon@pacificcorp.com;  
 lorendunn@riddellwilliams.com; Peterson-Lee.Piper@epamail.epa.gov;  
 sdowie@theafoss.com  
 Subject: Re:

Oops. I typed Loren's email address incorrectly. My apologies.

Kelly  
 Cole/R10/USEPA/U  
 S

04/20/2007 12:27  
 PM

sdowie@theafoss.com To  
 lorendunn@riddellwilliams.com, cc  
 dmosich@ci.tacoma.wa.us,  
 jackie.wetzsteon@pacificcorp.com,  
 Piper  
 Peterson-Lee/R10/USEPA/US@EPA  
 Subject

Su -

I understand from Loren Dunn that FWDA has not yet recorded the four restrictive covenants required under the Thea Foss Consent Decree. As you know, these RCs are mandatory institutional controls related to the remedial actions that occurred in the Thea Foss, and therefore must be put in place in order to protect the integrity of that remedial action.

It is my understanding that FWDA is in the process of recording three of the four RCs, but has concerns about the language in the fourth one. As Loren may have told you, the language in the RCs has been reviewed, vetted, and approved by EPA, and EPA has not allowed any modification of the language in the other 40+ RCs that have already been recorded by the rest of the landowners along the Foss.

As you know, the RCs do provide a process by which the grantor landowner may seek EPA's review and approval for work it would like to undertake in the restricted areas, including uses that are expressly restricted in the RC. For example, Foss Waterway Marina recently sought EPA review and received EPA approval for piling removal work in their area. Therefore, FWDA's anticipation that it would like to undertake some dock work in the area is not a valid reason not to record the RCs. As I said, there is a process in place to seek EPA review and approval of such work.

Please let me know as soon as possible when FWDA will record these four RCs.

Thank you.

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cole.kelly@epa.gov