

Corps/City of Seattle Settlement Agreement

SETTLEMENT AGREEMENT

The following Settlement Agreement is entered into between the United States Army Corps of Engineers, Seattle District (hereinafter "Corps"), and The City of Seattle, a Washington municipal corporation, by and through its Fleets and Facilities Department (hereinafter "Seattle").

I. Introduction

1.1 Seattle, by and through its Fleets and Facilities Department (hereinafter "FFD"), owns real property known as the Joint Training Facility site located at 9401 Myers Way South, Seattle, Washington (described in Attachment 1 to Exhibit A, called "Joint Training Facility") and adjoining real property to the south.

1.2 In May 2005, contractors to Seattle were constructing the Joint Training Facility, a 13-acre project designed to improve public safety by providing specialized props and training facilities for the City of Seattle's Fire, Public Utilities and Transportation departments.

1.3 By letter dated May 12, 2005, the Corps informed Seattle that the Corps had recently inspected Seattle property near Olson Place Southwest and Myers Way South, the site of the Joint Training Facility, and adjoining real property to the south. The Corps indicated that it had observed that fill material had been placed in "waters of the United States" without a Department of the Army permit, in violation of federal law. The Corps directed Seattle to do no further work waterward of ordinary high water and in wetlands at the site. The Corps requested information within 30 days of the letter. Seattle provided such information as requested.

1.4 The Corps maintains that Seattle, or others acting on its behalf, has violated

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Section 301 and 404 of the Clean Water Act, 33 U.S.C. 1311(a) and 1344, by placing dredged and/or fill material into waters of the United States without authorization at the Joint Training Facility and on two additional areas to the south as described in Attachment 2 to Exhibit A. (The Joint Training Facility and the two areas together make up "the Property.")

1.5 Seattle does not admit that any violation of the Clean Water Act has been caused by past activities on its behalf at the Property.

1.6 In the interest of resolving the issues in a productive manner and in the public interest, and without this Agreement constituting evidence or an admission by any party with respect to any issue in any other proceeding, it is hereby agreed as follows:

II. Settlement Scope and Enforcement

2.1 This Agreement shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties under Sections 301 and 404 of the Federal Water Pollution Control Act (Clean Water Act) with respect to the actions of Seattle, as described above, or included in the Corps Reference File No. 200500505 to date, as to the actions of every officer, official, employee, contractor, subcontractor, attorney, consultant, representative and agent acting on behalf of Seattle. The Corps does not waive any rights or remedies available to it for any other alleged claim or violation by Seattle, or any of its officers, officials, employees, contractors, subcontractors, attorneys, consultants, representatives or agents, of other federal laws, regulations, or permit conditions.

2.2 The terms of this Agreement shall apply to and be binding upon, and inure to the benefit of, Seattle and every officer, official, employee, contractor, subcontractor,

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consultant, representative, and agent acting on behalf of Seattle, whether or not such person has notice of this Agreement.

2.3 The transfer of ownership or other interest in the Joint Training Facility by Seattle shall not alter or relieve Seattle of its obligation to comply with the terms of this Agreement to implement the Final Mitigation Plan. At least fifteen (15) business days prior to the transfer of ownership or other interest in the Joint Training Facility, the party making such a transfer shall provide written notice and a true copy of this settlement agreement to its successors in interest and shall notify the Corps that such notice has been given. As a condition to any such transfer, Seattle shall reserve all rights necessary to comply with the terms of this Agreement.

2.4 The Corps shall retain all legal and equitable remedies available to it to enforce the provisions of this Agreement. If the Corps learns of actions that the Corps considers a possible breach of this Agreement, the Corps shall promptly provide notice to Seattle and inform Seattle of the actions the Corps deems necessary to cure the alleged breach. In the public interest, the parties shall work together to resolve any alleged breach. The Corps will consider a breach of this Agreement to be a violation of the authorization provided under NWP 32. In the event that the Corps determines that there has been a breach of this Agreement, the District Engineer may refer the matter to the Department of Justice and ask that it file a civil action on his behalf to enforce the terms of this Agreement. The City of Seattle hereby agrees that if such an action is filed, they shall have no defense as to liability other than they are not in breach of this Agreement.

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III. Mitigation and Permitting

3.1 Seattle shall implement the restoration, creation and enhancement activities in the manner described in the attached Mitigation Plan (Exhibit A as modified by Exhibit B), in accordance with the schedule set forth therein. This requirement to implement is enforceable under this Agreement. The term "Final Mitigation Plan" includes the Mitigation Plan and all modifications made to that document hereafter by written agreement of the parties. In the event of such modification, this Agreement is deemed modified accordingly without further action by the parties, such that the parties' obligations expressed in this Agreement shall be based on the most recent version of the Final Mitigation Plan, including its schedule.

3.2 As described in the attached Mitigation Plan, Seattle seeks authorization from the Corps to retain 0.97 acres of fill in place on the Property and to discharge 0.36 acres of additional fill for mitigation, restoration or environmental benefit at the Joint Training Facility plus additional fill at the Joint Training Facility and in an offsite mitigation area on the Duwamish River to accomplish the Mitigation Plan.

3.3 By issuing the Nationwide Permit 32 verification letter, the Corps agrees that the mitigation required by this Agreement provides for environmental benefits to an equal or greater degree than the environmental detriments that the Corps maintains were caused by Seattle's unauthorized activity of allegedly placing fill in wetlands at the Property.

3.4. This Agreement is subject to the Corps issuance of a verification letter within thirty (30) business days from both parties having signed this Agreement, in accordance with the terms and conditions of Nationwide Permit Number 32 found at 67 Fed. Reg. 2019-2095 (Jan. 15, 2002), authorizing (a) that 0.97 acres of fill may remain in place at the

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Property and (b) the additional discharge of dredged or fill material, including 0.36 acres of fill at the Joint Training Facility together with such specific fill as necessary to implement the Final Mitigation Plan. The Corps will make best efforts to issue the verification letter in a shorter time period if legally possible. If requested by the City and necessary to complete the elements of the Final Mitigation Plan according to the schedule therein, the Corps will reissue a verification letter or authorization under then-current legal authority.

3.5 Except as in accordance with this Agreement, Seattle, and Seattle's every officer, official employee, contractor, subcontractor, consultant, representative, and agent acting on behalf of Seattle, successors and assigns, shall not place structures, or discharge dredged or fill material (33 U.S.C. § 1344), into waters of the United States at the Joint Training Facility, except as otherwise provided by law.

IV. Safeguards

4.1 Seattle has entered into an escrow arrangement in favor of the Corps in the amount of \$200,000 to secure the performance of mitigation. Upon request by the City, the Corps shall approve in writing directions to the escrow agent, Wells Fargo Bank, National Association, or its successor or assign, that allow the escrow agent to disburse escrow funds according to the terms of the escrow arrangement to Seattle as requested by Seattle to pay for restoration, creation, enhancement and mitigation work under this Agreement.

4.2 Seattle shall provide progress reports to the Corps in accordance with the timeline set forth in the final mitigation plan, and follow all special conditions of the Nationwide Permit 32 verification letter, concerning construction and monitoring of the mitigation areas, subject to appeal. As part of this requirement, Seattle must obtain all of the applicable authorizations from the Corps and other appropriate Federal, state, and local

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agencies before implementing the final mitigation plan. The Corps acknowledges that mitigation work requires a variety of governmental authorizations and that events can occur that delay or prevent performance of mitigation work. In the public interest, the parties shall coordinate to resolve schedule difficulties with the common goal of promptly completing mitigation. Seattle shall notify the Corps within a reasonable time if Seattle comes to expect or encounters a delay in or other obstacle to meeting the final mitigation plan or schedule, due to acts of nature, permitting-related delays, third party appeals or other causes beyond the reasonable control of FFD. The Corps shall evaluate the circumstances. If the Corps' independent evaluation determines that Seattle has been delayed in performance or prevented from performing by causes beyond the reasonable control of FFD, then the Corps shall agree to amend the mitigation plan and schedule to provide reasonable time for performance or to otherwise modify the obligations to reasonably account for the nature of the obstacle. However, should the Corps' independent evaluation determine that performance delays in achieving the milestones of the Mitigation Plan are attributable to bad faith on the part of the Seattle, the Corps may consider Seattle in violation of this Agreement, and trigger the provisions of paragraph 2.4 of this Agreement.

4.3 After Seattle has constructed a created wetland according to the Final Mitigation Plan in the "dogleg" area in the northeast region of the Joint Training Facility at Area of Concern 4, now depicted in the Mitigation Plan at Appendix C, Sheet C1.02 as "0.30 AC," Seattle shall commission an as-built survey of such wetland creation area and shall record a Declaration of Covenant against the title to the real property pertaining to such wetland creation area, in favor of the Corps, in substantially the following form:

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DECLARATION OF COVENANT

WHEREAS, a wetland mitigation area has been created on the real property described in the attached Exhibit A (the "Mitigation Area") as a condition of the issuance of a regulatory permit (the "Permit") from the United States Army Corps of Engineers, Seattle District (the "Corps"). This wetland provides mitigation for the use of wetland areas elsewhere.

Accordingly, it is understood that the Mitigation Area shall not be developed or filled, nor shall it be the subject of any future request for permission from the Corps that would allow its development or fill, unless the Corps has expressly agreed in writing to such development or fill. However, this Declaration shall not restrict the City in implementing all provisions of the wetland mitigation plan approved by the Corps under the Permit, nor prevent a request to the Corps for permission to restore or enhance this wetland mitigation area. This restriction shall run with the land and shall be binding on the successors and assigns of the undersigned owner of the Mitigation Area.

4.4 Seattle intends to execute an interdepartmental Agreement for Property Use and Maintenance regarding the offsite mitigation project described in the Mitigation Plan after obtaining the necessary City Council authorization. Such interdepartmental agreement shall provide that it shall be considered a real property covenant that runs with the land, and shall be recorded within sixty (60) days of its effective date against the titles of all the parcels that comprise the offsite mitigation project area. Seattle shall place copies of this Settlement Agreement and the City of Seattle interdepartmental Agreement for Property Use and Maintenance on file with the Seattle City Clerk. Written amendments to the Mitigation Plan that are made according to this Agreement shall also be placed on file with the City Clerk, and it shall be the responsibility of Seattle to provide such updated amendments in a timely manner to the Seattle City Clerk.

4.5 Seattle agrees to provide training to city project managers and permitting staff in 2007, on the subject of environmental regulation and project delivery systems, including specific training about Corps jurisdiction and permitting process under Section 404 of the Clean Water Act. Seattle plans to train City employees having job responsibilities expected

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to be directly related to potentially jurisdictional “waters of the United States”, who are in the Senior Capital Project Coordinator and Capital Project Coordinator job series or are real estate professionals or other employees having responsibility for acquiring land, permitting capital projects and/or delivering capital projects. Seattle’s goal is to provide training to such City employees before the end of 2008. Training is envisioned to occur over roughly two days and to take place at the Joint Training Facility site or a similar location. Training is expected to include instruction in the following content areas: local, state and federal regulatory framework with historical overview; wetland recognition and delineation including a field visit to a wetland; an introduction the Clean Water Act and other relevant law, code and requirements; techniques for creating an interface with various regulatory agencies, including the Corps; and how to plan and document a project with consultants to include appropriate involvement with regulatory agencies. Seattle shall also develop a plan to implement improved City oversight regarding planning processes and the Corps jurisdiction under the Clean Water Act in the future. Seattle will submit a progress report to the Corps on each of the dates listed below regarding the corresponding milestone, if the date occurs after the effective date of the Agreement; if it does not, then Seattle will submit the report within a reasonable time after the Agreement is effective:

August 1, 2007: Consultant Selection and Training Development; Explanation of Plan for Improved City Oversight

November 1, 2007: Progress of Training Delivery

February 1, 2008: Progress of Training Delivery

May 1, 2008: Progress of Training Delivery (if not previously complete)

August 1, 2008: Final Report on Training Delivery (if not previously complete and provided)

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V. Termination

5.1 Seattle shall notify the Corps in writing within thirty (30) business days of the completion of all restoration, creation and enhancement work required by this Agreement, including any monitoring. Upon receipt of the final mitigation monitoring report, the Corps will schedule with Seattle as promptly as possible an inspection of each of the mitigation sites described in the final mitigation plan, and within thirty (30) business days after inspection has occurred, the Corps will notify Seattle in writing as to whether the required work has been completed and Seattle has fulfilled the mitigation requirements of its permit authorization.

5.2 Seattle's obligations under this Agreement shall terminate when the Corps notifies the City that the Corps has determined that Seattle has fulfilled the mitigation requirements of its permit authorization.

VI. General Provisions

6.1. This Agreement contains the entire agreement, between the parties with regard to the matters set forth in it.

6.2 Any modification of this Agreement shall be in writing and shall not take effect unless and until signed by the parties.

6.3 All notices, reports, and submissions to the Corps required by this Agreement shall be in writing and shall be effective upon mailing via first class U.S. mail to:

Chief, Regulatory Branch
United States Army Corps of Engineers
Seattle District
P.O. Box 3755
Seattle, Washington 98124-3755
ATTN: 200500505

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All notices, reports, and submissions to Seattle required by this Agreement shall be in writing and shall be effective upon mailing via first class U.S. mail to:

Director, Fleets and Facilities Department
700 Fifth Avenue, Suite 5200
P.O. Box 94689
Seattle, WA 98124-4689

A party may change the person and address for receipt of the party's notice as identified in Paragraphs 6 and 7 by providing written notice to the other party.

6.4 The provisions of this Agreement shall be severable. If any provision, or application thereof, shall be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions, and application thereof, shall not be affected.

6.5 This Agreement may be executed in any number of counterpart originals, which together shall constitute one enforceable agreement binding on the parties hereto. This Agreement shall become effective after signature by both parties, and upon the date of the Corps' issuance of a Nationwide Permit 32 verification letter to Seattle.

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VII. Parties Best Interest

7.1 The parties agree that this Agreement is in their best interests and that its terms are reasonable under the circumstances.

SO AGREED.

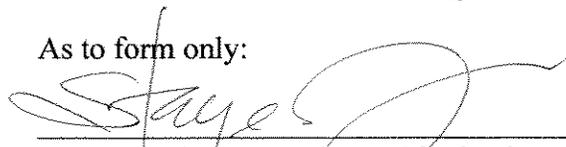
United States Army Corps of Engineers

The City of Seattle

By: 
Colonel Michael McCormick
Seattle District Engineer
Dated this 5th day of January, 2007

By: 
Brenda Bauer
Its Director, Fleets and Facilities Department
Dated this 15th day of December, 2006

As to form only:


Stacy E. Johnson, Assistant District Counsel,
U.S. Army Corps of Engineers, Seattle District
As to Form this 5 day of January, 2007

THOMAS A. CARR
Seattle City Attorney

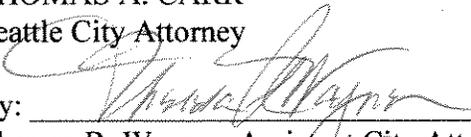
By: 
Theresa R. Wagner, Assistant City Attorney
As to Form this 4th day of December, 2006

Exhibit A to Settlement Agreement: City of Seattle Joint Training Facility Mitigation Plan

Exhibit B to Settlement Agreement: Modification to Mitigation Plan

Information to be attached to the Mitigation Plan:

- Attachment 1: Legal description of Seattle Joint Training Facility
- Attachment 2: "The Property" for the Purposes of the Joint Training Facility Agreement