

EVERETT CITY COUNCIL AGENDA ITEM COVER SHEET

PROJECT TITLE:

Right-of-Entry for Riverfront
Development – North Wetland
Complex

- Briefing
- Proposed Action
- Consent
- Action
- First Reading
- Second Reading
- Third Reading
- Public Hearing
- Budget Advisory

COUNCIL BILL # _____
 Originating Department Public Works
 Contact Person Tom Hood
 Phone Number 425-257-8809
 FOR AGENDA OF June 15, 2016

Initialed by:
 Department Head _____
 CAA db
 Council President _____

<u>Location</u>	<u>Preceding Action</u>	<u>Attachments</u>	<u>Department(s) Approval</u>
Riverfront Development – North Wetland Complex		Right-of-Entry Agreement	Public Works, Legal

Amount Budgeted	\$500.00	
Expenditure Required	\$500.00	Account Number(s): RD 3312
Budget Remaining	N/A	
Additional Required	N/A	

DETAILED SUMMARY STATEMENT:

The City has recently advertised the North Wetlands Complex project for construction bids. A portion of the proposed construction for this project involves access to Department of Natural Resources (DNR) property. This access requires a right-of-entry agreement between the City and DNR. There is a fee of \$500 required for the right-of-entry.

RECOMMENDATION (Exact action requested of Council):

Authorize the Mayor to sign the Right-of-Entry Agreement with the Department of Natural Resources for the Riverfront Development – North Wetlands Complex project in the amount of \$500.



WASHINGTON STATE DEPARTMENT OF
Natural Resources
Peter Goldmark - Commissioner of Public Lands

AQUATIC LANDS RIGHT OF ENTRY

Right of Entry No. 23-093653

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and CITY OF EVERETT, a municipal corporation ("Licensee").

THE Parties agree as follows:

SECTION 1 GRANT OF PERMISSION

1.1 Permission. Subject to the terms and conditions set forth below, State grants Licensee a revocable, nonexclusive license to enter upon the real property described in Exhibit A (the "Property"). In this agreement, the term "Right of Entry" means this agreement and the rights granted.

1.2 Other Interests and Rights. This Right of Entry is subject to all valid interests of third parties noted in the records of Snohomish County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington. Licensee is responsible for obtaining approvals from other persons, if any, who have an interest in the Property. This Right of Entry is subject to the rights of the public under the Public Trust Doctrine or federal navigation servitude and treaty rights of Indian Tribes.

SECTION 2 USE

2.1 Authorized Activities. Licensee shall enter the Property only for the purpose of conducting the activities described in Exhibit B (the "Activities") and for no other purpose. Licensee shall not conduct any other activities on the Property without the prior written permission of State.

2.2 Restrictions on Activities

- (a) The limitations in this Paragraph 2.2 apply to the Property and adjacent state-owned aquatic land. Licensee's compliance with this Paragraph 2.2 does not limit Licensee's liability under any other provision of this License.
- (b) Licensee shall not cause or permit:
 - (1) Damage to natural resources,

- (2) Waste, or
- (3) Deposit of material, unless approved by State in writing.
- (c) State may take any steps reasonably necessary to remedy any failure of Licensee to comply with the restrictions on activities under this Subsection 2.2. Upon demand by State, Licensee shall pay all remedial costs and natural resources damages.

2.3 Conformance with Laws. Licensee shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding its activities on the Property.

2.4 Interference with Other Uses.

- (a) Licensee shall exercise Licensee's right of entry under this Right of Entry in a manner that minimizes or avoids interference with the rights of State, the public or others with valid right to use or occupy the Property or surrounding lands and water.
- (b) Licensee and its agents, contractors, and subcontractors shall provide State with at least two (2) weeks notice before commencing any Activities. Licensee shall promptly notify State of any modifications in the schedule.

SECTION 3 TERM

3.1 Term Defined. This right of entry is effective on the 15th day of June, 2016 ("Effective Date"), and terminates on the 14th day of June, 2017. ("Termination Date"), unless terminated sooner under the terms of this Right of Entry.

3.2 End of Term. Upon termination of this Right of Entry and except as otherwise provided in Exhibit B, Licensee shall restore the Property to a condition substantially like its natural state before Licensee's Activities.

SECTION 4 CONSIDERATION

The consideration is a fee in the amount of Five Hundred Dollars (\$500.00), which is due and payable on or before the effective date.

SECTION 5 ENVIRONMENTAL LIABILITY

5.1 Definitions.

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup, including oil and petroleum products.

- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any Hazardous Substance law.

5.2 General Conditions. Licensee shall exercise the utmost care with respect to Hazardous Substances, including the foreseeable acts or omissions of third parties affecting Hazardous Substances, consistent with the standard of care applicable under the Model Toxics Control Act, RCW 70.105D.040.

5.3 Use of Hazardous Substances.

- (a) Licensee, its contractors, agents, employees, guests, invitees, or affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances on the Property or adjacent state-owned aquatic lands, except in accordance with all applicable laws.
- (b) Licensee shall not undertake, or allow others to undertake by Licensee's permission, acquiescence, or failure to act, activities on the Property or adjacent state-owned aquatic lands that:
 - (1) Result in a release or threatened release of Hazardous Substances, or
 - (2) Cause, contribute to, or exacerbate any contamination exceeding regulatory cleanup standards whether the regulatory authority requires cleanup before, during, or after Licensee's activities on the Property.

5.4 In the Event of a Release or Threatened Release.

- (a) Licensee shall immediately notify State if the Licensee becomes aware of any release or threatened release of Hazardous Substance on the Property.
- (b) If a Licensee's act or omission results in a release of Hazardous Substances, Licensee, at its sole expense, shall promptly take all actions necessary or advisable to clean up, contain, and remove the Hazardous Substances in accordance with applicable laws.

SECTION 6 ASSIGNMENT

Licensee shall not assign this Right of Entry.

SECTION 7 INDEMNITY AND INSURANCE

7.1 Indemnity.

- (a) Licensee shall indemnify, defend, and hold State, its employees, officers, and agents harmless from any Claims arising out of the Activities or related activities by Licensee, its contractors, agents, invitees, guests, employees or affiliates.
- (b) "Claim" as used in this Subsection 7.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys' fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. "Damages to tangible property" includes, but is not limited to,

- physical injury to the Property, including damage resulting from Hazardous Substances, and damages resulting from loss of use of the Property.
- (c) State shall not require Licensee to indemnify, defend, and hold State harmless for claims that arise solely out of the willful or negligent act of State or State's elected officials, employees, or agents.
 - (d) Licensee waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless.

7.2 Insurance Terms.

- (a) Insurance Required.
 - (1) Licensee certifies that it is self-insured for all the liability exposures, its self-insurance plan satisfies all State requirements, and its self-insurance plan provides coverage equal to that required in this Subsection 7.2 and by Subsection 7.3, Insurance Types and Limits. Licensee shall provide to State evidence of its status as a self-insured entity. Upon request by State, Licensee shall provide a written description of its financial condition and/or the self-insured funding mechanism. Licensee shall provide State with at least thirty (30) days' written notice prior to any material changes to Licensee's self-insured funding mechanism.
 - (2) Unless State agrees to an exception, Licensee shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Licensee may submit a request to the risk manager for the Department of Natural Resources to approve an exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies shall comply with Chapter 48.15 RCW and 284-15 WAC.
 - (3) All general liability, excess, umbrella liability insurance policies must name the State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees as an additional insured.
 - (4) All insurance provided in compliance with this Right of Entry must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.
- (b) Waiver.
 - (1) Licensee waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Right of Entry covers these damages.
 - (2) Except as prohibited by law, Licensee waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this Right of Entry.
- (c) Proof of Insurance.
 - (1) Licensee shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with

- insurance requirements specified in this Right of Entry and, if requested, copies of policies to State.
- (2) The certificate(s) of insurance must reference additional insureds and the Right of Entry number.
 - (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.
- (d) State must receive written notice before cancellation or non-renewal of any insurance required by this Right of Entry, as follows:
- (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.
 - (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.
- (e) Adjustments in Insurance Coverage.
- (1) State may impose changes in the limits of liability for all types of insurance as State deems necessary.
 - (2) Licensee shall secure new or modified insurance coverage within thirty (30) days after State requires changes in the limits of liability.
- (f) General Terms.
- (1) State does not represent that coverage and limits required under this Right of Entry are adequate to protect Licensee.
 - (2) Coverage and limits do not limit Licensee's liability for indemnification and reimbursements granted to State under this Right of Entry.
 - (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to property first to restore the real property covered by this Right of Entry, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Licensee.

7.3 Insurance Types and Limits.

- (a) General Liability Insurance.
- (1) Licensee shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Property and/or arising out of Licensee's use, occupation, or control of the Property and, if necessary, commercial umbrella insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit must be at least twice the "each occurrence" limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the "each occurrence" limit.
 - (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent

coverage). All insurance must cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract) and contain separation of insured (cross-liability) condition.

(3) MGL insurance must have no exclusions for non-owned watercraft.

(b) Workers' Compensation.

(1) State of Washington Workers' Compensation.

(i) Licensee shall comply with all State of Washington workers' compensation statutes and regulations. Licensee shall provide workers' compensation coverage for all employees of Licensee. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with Licensee's use, occupation, and control of the Property.

(ii) If Licensee fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Licensee shall indemnify State. Indemnity shall include all fines; payment of benefits to Licensee, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.

(2) Longshore and Harbor Worker's Act. The Longshore and Harbor Worker's Compensation Act (33 U.S.C. Section 901 *et seq.*) may require Licensee to provide insurance coverage for longshore and harbor workers other than seaman. Licensee shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with this Act. Licensee is responsible for all civil and criminal liability arising from failure to maintain such coverage.

(3) Jones Act. The Jones Act (46 U.S.C. Section 688) may require Licensee to provide insurance coverage for seamen injured during employment resulting from negligence of the owner, master, or fellow crew members. Licensee shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with this Act. Licensee is responsible for all civil and criminal liability arising from failure to maintain such coverage.

(c) Employer's Liability Insurance. Licensee shall procure employer's liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.

SECTION 8 TERMINATION

8.1 Termination by Revocation. State may terminate this Right of Entry at any time upon thirty (30) days notice to the Licensee.

8.2 Termination by Completion of Activities. If Licensee completes Activities prior to the Termination Date, this Right of Entry terminates upon Licensee's completion of all Activities, including restoration of the Property under Subsection 3.2.

SECTION 9 NOTICE

Following are the locations for delivery of notice and the Contact Person. Any Party may change the location of notice and/or the Contact Person upon reasonable notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES
Orca-Straits District
919 N. Township St.
Sedro-Woolley, WA 98284-9384

Licensee: CITY OF EVERETT
City Clerk
2930 Wetmore Avenue
Everett, WA 98201

SECTION 10 MISCELLANEOUS

10.1 Headings. The headings used in this Right of Entry are for convenience only and in no way define, limit, or extend the scope of this Right of Entry or the intent of any provision.

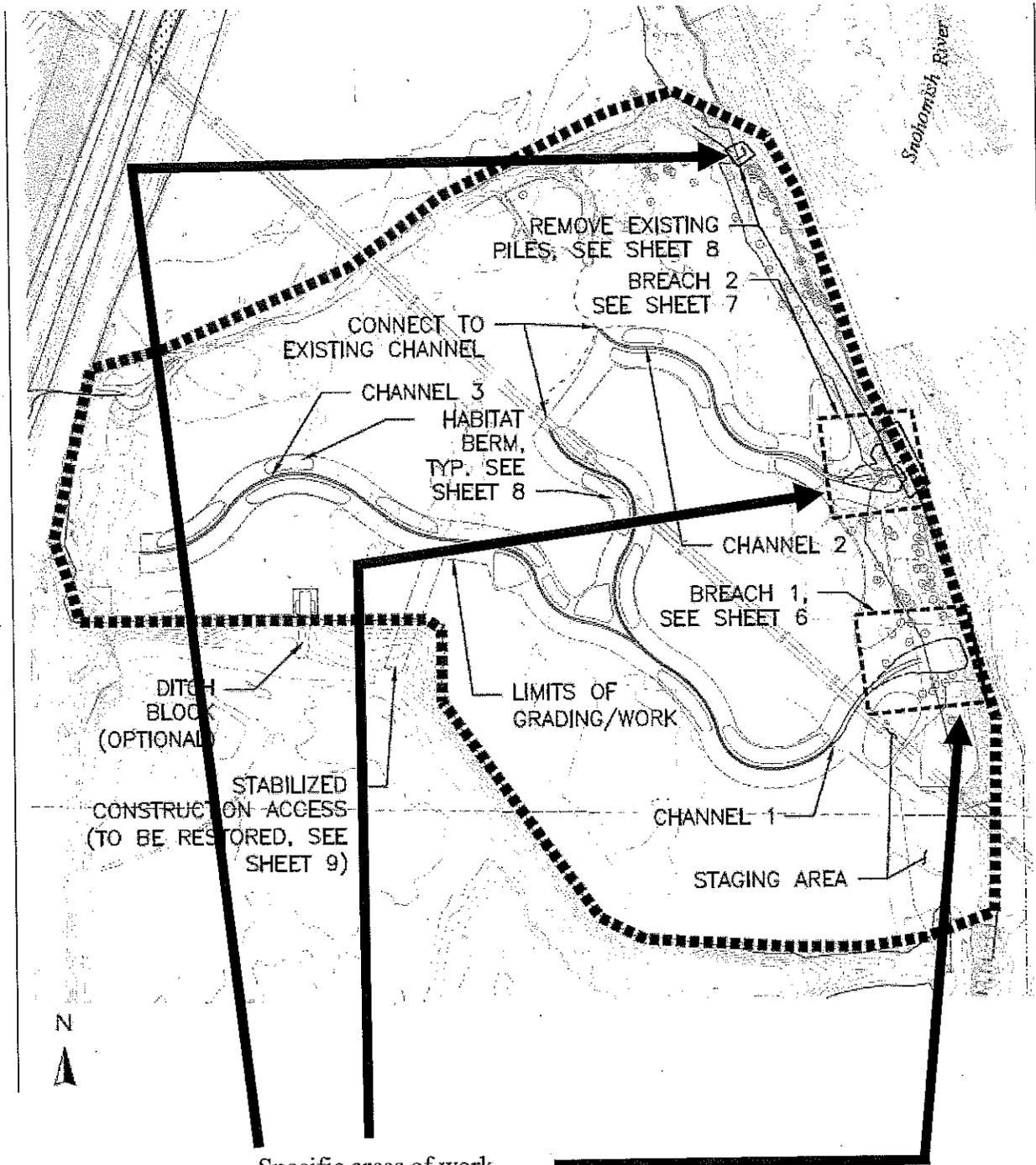
10.2 Invalidity. The invalidity, voidness, or illegality of any provision of this Right of Entry does not affect, impair, or invalidate any other provision of this Right of Entry.

10.3 Applicable Law and Venue. This Right of Entry is to be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute means that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Right of Entry is in the Superior Court for Thurston County, Washington.

10.4 Modification. No modification of this Right of Entry is effective unless in writing and signed by the Parties. Oral representations or statements do not bind either Party.

10.5 Survival. Any obligations of Licensee not fully performed upon termination of this Right of Entry do not cease, but continue as obligations of the Licensee until fully performed.

**EXHIBIT A
PROJECT AREA**



Specific areas of work
on state-owned aquatic lands

**PLAN OF OPERATIONS
EXHIBIT B**

1. DESCRIPTION OF ACTIVITIES

A. Existing Conditions

The North Wetland Complex (NWC) is a 32-acre area of land along the Snohomish River in the City of Everett. The NWC is part of the 221-acre Riverfront Development Site, for which the City is responsible for public amenities, including wetland enhancements. At present, Bigelow Creek, which is not on state-owned aquatic lands (SOAL) is the only existing channel connecting the Snohomish River and the wetland.

Improvements currently located on SOAL consist of approximately 100 abandoned creosote-treated pilings, and additional beams from a derelict railroad trestle. These items are along the western bank of the Snohomish River adjacent to the NWC.

B. Proposed Conditions.

The City of Everett is proposing to restore tidally influenced wetland habitat within the Snohomish River by creating two new breaches into the NWC; excavating three new channels within the NWC; and connecting two of the channels together.

Activities on SOAL include the following:

- (1) Excavation of two breaches (Breach 1 and Breach 2) along the western bank of the river, which will remove 500 cubic yards of material; and
- (2) Removal of derelict creosote-treated piles and railroad trestle beams, as follows:

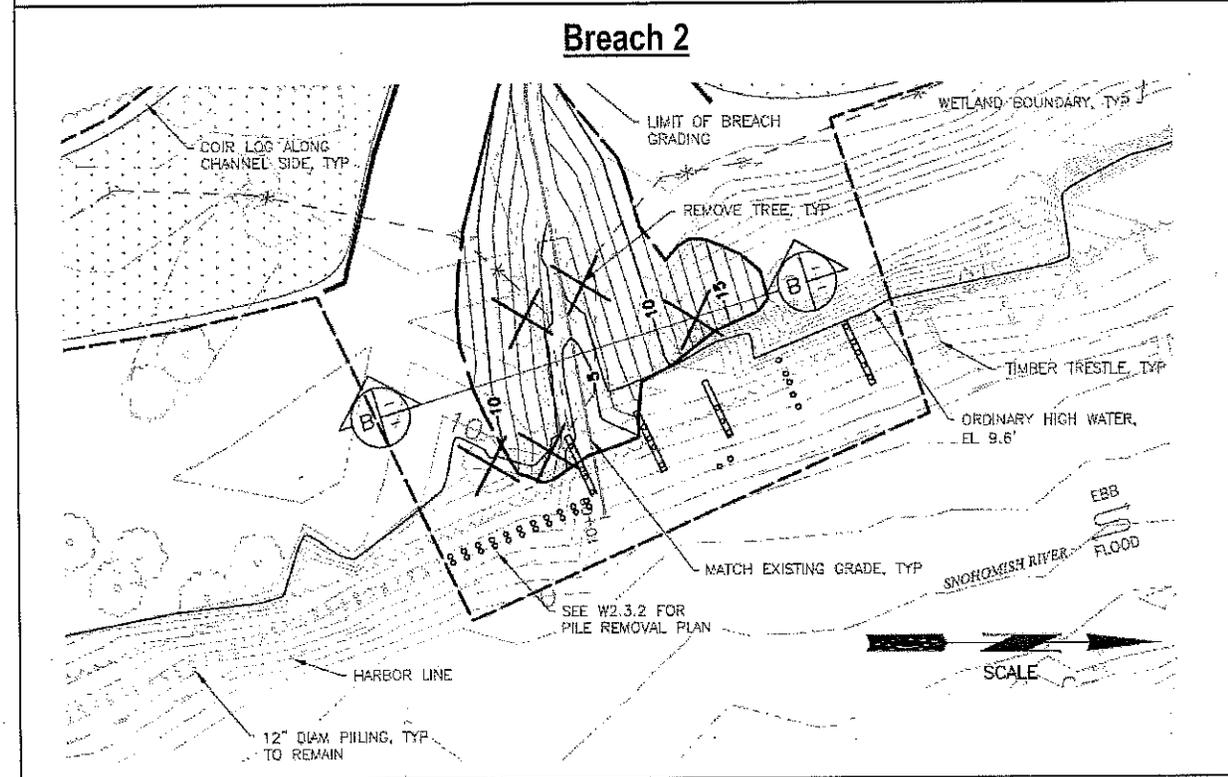
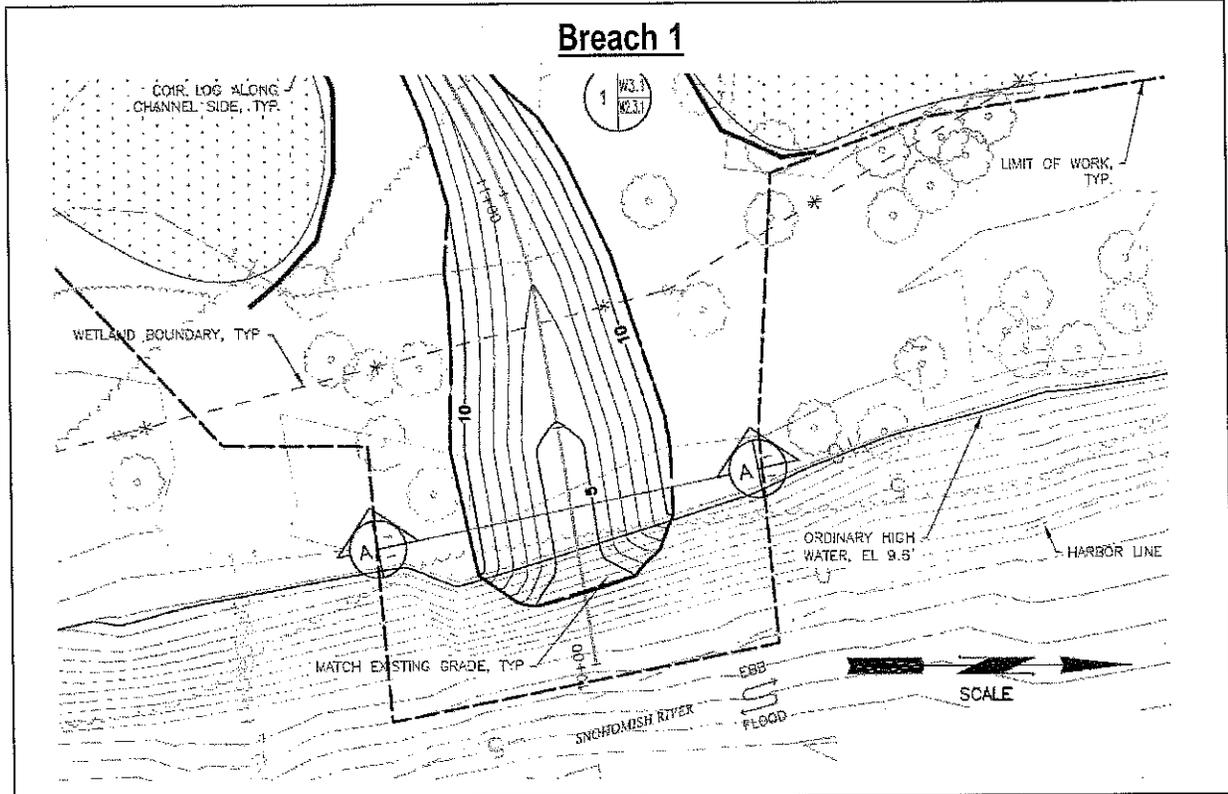
LOCATION	NO. PILES	NO. BEAMS
BREACH 1	Undetermined (not visible above the water line)	0
BREACH 2	45	4
EXISTING CHANNEL	15	0

Licensee has submitted Attachments 1 and 2 to this Exhibit B. State grants its consent to this Work, except that Licensee shall conform all Work to all other requirements of Section 5 of this License.

2. ADDITIONAL OBLIGATIONS

- A.** Licensee shall remove all creosote-treated pilings and beams depicted in Attachments 1 and 2 to this Exhibit B. Removal must be complete by June 14, 2017.

**ATTACHMENT 1 TO EXHIBIT B
BREACH PLANS**



**ATTACHMENT 2 TO EXHIBIT B
REMOVAL PLAN FOR VISIBLE PILINGS AND BEAMS**

