

1 Honorable Robert J. Bryan
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10 UNITED STATES DISTRICT COURT
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12 WESTERN DISTRICT OF WASHINGTON
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14 AT TACOMA
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17 UNITED STATES OF AMERICA, STATE OF)
18 WASHINGTON, PUYALLUP TRIBE OF)
19 INDIANS and MUCKLESHOOT INDIAN TRIBE,) CIVIL NO. C09-5246RJB
20)
21 Plaintiffs,) CONSENT DECREE
22)
23 vs.)
24)
25)
26)
27)
28)

CONSENT DECREE - Page 1

U.S. Department of Justice
NOAA GC - DOJ DARC
7600 Sand Point Way NE
Seattle, WA 98115-0070
(206) 526-6616

I. INTRODUCTION

The United States of America (“United States”), on behalf of 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 Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe (collectively, “Plaintiffs”), have filed a complaint in this case against defendants Occidental Chemical Corporation, Pioneer Americas, LLC, Mariana Properties, Inc., Detrex Corporation, Sound Refining, Inc., and SRI Acquisition Corporation, (“Defendants”) 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). This Consent Decree (the “Decree”) addresses the claims asserted in the Complaint against Defendants for Natural Resource Damages (as defined below) in the Commencement Bay Environment (as defined below).

II. RECITALS

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

1 B. Investigations conducted by the United States Environmental Protection Agency
2 (“EPA”), the Trustees, and others have detected hazardous substances in the sediments, soils and
3 groundwater of the Commencement Bay Environment, including but not limited to arsenic, antimony,
4 cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2-ethylhexyl)-phthalate,
5 hexachlorobenzene, hexachlorobutadiene, polycyclic aromatic hydrocarbons (PAHs), and
6 polychlorinated biphenyls (PCBs). Overall, the Trustees have documented the presence of over 30
7 hazardous substances in the marine sediments of Commencement Bay’s Hylebos Waterway.
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9 C. The Trustees began assessing natural resource damages in the Commencement Bay
10 Environment in October 1991 by finding that hazardous substances had been released into the
11 Commencement Bay Environment; that public trust natural resources had likely been injured by the
12 releases; that data sufficient to pursue a natural resource damage assessment were available or could
13 likely be obtained at a reasonable cost; and that, without further action, implemented and planned
14 response actions would not adequately remedy the resource injuries. *See* Preassessment Screen of
15 Natural Resource Damages in the Commencement Bay Environment Due to Activities Taking Place
16 In and About the Commencement Bay/Nearshore Tideflats (CB/NT) Superfund Site (October 29,
17 1991). The Trustees notified representatives of known potentially responsible parties (“PRPs”) of
18 their intent to conduct a damage assessment. The Trustees subsequently entered into a Funding and
19 Participation Agreement for Phase 1 of the Commencement Bay-Wide Natural Resource Damage
20 Assessment, dated February 10, 1993, with several of the major PRPs. The Trustees published a
21 report on the results of Phase 1 of the damage assessment process in June 1995. The PRPs did not
22 participate in subsequent stages of the damage assessment, and the Trustees continued the process
23 independently. The Trustees have now completed a series of studies during Phase 2 of the damage
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1 assessment, focusing on impacts of contaminants on marine sediments, benthic organisms, flatfish and
2 salmonids. Results of those studies were published in a series of reports, consisting of
3 Commencement Bay Natural Resource Trustees, 1996, Hylebos Waterway Data and Data Analysis
4 Report; Collier, T.K., L.L. Johnson, M.S. Myers, C.M. Stehr, M.M. Krahn, and J.E. Stein, 1998, Fish
5 injury in the Hylebos Waterway in Commencement Bay, Washington; Mary R. Arkoosh, Ed Casillas,
6 Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical Contaminants
7 from the Hylebos Waterway on Disease Resistance of Juvenile Salmon; Ed Casillas, Bich-Thuy L.
8 Eberhart, Frank C. Sommers, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects
9 of Chemical Contaminants from the Hylebos Waterway on Growth of Juvenile Chinook Salmon; and
10 Ed Casillas, Bich-Thuy L. Eberhart, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998,
11 Exposure of Juvenile Chinook Salmon to Chemical Contaminants Specific to the Hylebos Waterway.
12 Based on this research, the Plaintiffs and Defendants (collectively, the “Parties” and, individually, a
13 “Party”) agree that no further natural resource damage assessment is required to effectuate the
14 purposes of this Consent Decree, with respect to Defendants.

15 D. Plaintiffs have filed a complaint (the “Complaint”) pursuant to Section 107 of
16 CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW; CWA, 33 U.S.C. §§ 1251 et seq.; and
17 OPA, 33 U.S.C. §§ 2701 et seq., seeking recovery from Defendants of damages for injury to,
18 destruction of, and loss of natural resources resulting from releases of hazardous substances into the
19 Commencement Bay Environment, including the costs of assessing the damages.

20 E. Plaintiffs allege in the Complaint that Defendants each own or in the past owned
21 and/or operated real property or facilities, identified by the Trustees as:
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23

1	<u>Defendants</u>	<u>Site Name</u>
2	Occidental Chemical Corporation, Pioneer	OCCIDENTAL
3	Americas, LLC, Mariana Properties, Inc., and	
4	Detrex Corporation	
5		
6	Sound Refining, Inc., and SRI Acquisition	SOUND REFINING
7	Corporation	
8		
9		

10 Plaintiffs also allege in the Complaint that Occidental is or was associated with releases of hazardous
11 substances into the Commencement Bay Environment from the real properties or facilities identified
12 by the Trustees as the BONNEVILLE POWER site and the GENERAL METALS OF TACOMA
13 site. Plaintiffs further allege that from each site storm water, surface water runoff, wastewater, other
14 process discharges, and/or groundwater have flowed to the Commencement Bay Environment.
15 Plaintiffs also allege that investigations by EPA and others have detected concentrations of hazardous
16 substances in soils, groundwater and/or sediments on or in those properties or facilities. Some of
17 these hazardous substances are found in the sediments of the Commencement Bay Environment.

18 F. Plaintiffs further allege that hazardous substances have been or are being released to
19 the Commencement Bay Environment from properties or facilities owned and/or operated by each
20 Defendant through direct discharge, surface water runoff, groundwater and/or seeps, and that those
21 hazardous substances have caused injury to, destruction of and loss of natural resources in the
22 Commencement Bay Environment under Plaintiffs' trusteeship, including fish, shellfish, invertebrates,
23 birds, marine sediments, and resources of cultural significance. Plaintiffs further allege that each of
24 them and the public have suffered the loss of natural resource services (including ecological services
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1 as well as direct and passive human use losses) as a consequence of those injuries.

2 G. Plaintiffs allege that each Defendant is either (a) the owner and/or operator of a vessel
3 or a facility; (b) a person who at the time of disposal or release of any hazardous substance owned
4 or operated any facility at which such hazardous substances were disposed of; (c) a person who by
5 contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter
6 for transport for disposal or treatment, of hazardous substances owned or possessed by such person,
7 by any other party or entity, or otherwise generated any hazardous substance disposed of or treated,
8 at any facility or incineration vessel owned or operated by another party or entity and containing such
9 hazardous substances; and/or (d) a person who accepts or accepted any hazardous substances for
10 transport to disposal or treatment facilities, incineration vessels or sites selected by such person from
11 which there is a release or a threatened release of a hazardous substance that causes the incurrence
12 of response costs or remedial action costs within the meaning of 42 U.S.C. § 9607 and RCW
13 70.105D.040.

14 H. Defendants each deny all the allegations of the Complaint, and the allegations
15 contained in Paragraphs E, F, G and K of this Section.

16 I. Although the Trustees have initiated but not yet completed a natural resource damage
17 assessment for the Commencement Bay Environment, the Trustees have developed and analyzed
18 information sufficient to support a settlement that is fair, reasonable and in the public interest.

19 J. To facilitate resolving natural resource damage claims, the Trustees developed a
20 proposed allocation of Hylebos Waterway Natural Resource Damages liability among Hylebos
21 Waterway PRPs solely for settlement purposes. Relying upon the results of the damage-assessment
22 studies, remedial investigations, regulatory standards, and scientific literature, the Trustees first
23

1 developed an estimate of the amount of injury to natural resources that had occurred as a result of
2 releases of hazardous substances to the Hylebos Waterway. The Trustees quantified the effects of the
3 injuries in terms of the losses of ecological services over affected areas of the waterway and over
4 time, discounted to the current year. The Trustees used the term discounted ecological service
5 acre-years (DSAYs) to describe both the scale of the injuries, and the amount of habitat restoration
6 they are seeking to compensate for the injuries. For the Hylebos Waterway, the Trustees are seeking
7 to recover from all PRPs funds, property and/or in-kind services needed to generate habitat
8 restoration sufficient to compensate for the loss of 1526.77 DSAYs.
9

10 K. Plaintiffs assert that hazardous-substance releases to the Hylebos Waterway have
11 become dispersed and commingled to the extent that the effects of one PRP's releases cannot be
12 readily distinguished from another's. Plaintiffs further assert that the circumstances of the Hylebos
13 Waterway contamination make all PRPs who contributed to the contamination jointly and severally
14 liable for all injuries to natural resources that have resulted from the contamination. As a
15 consequence, Plaintiffs assert the right to recover for the loss of all 1526.77 DSAYs from any
16 Hylebos Waterway PRP. Without prejudice to their position, and solely for purposes of facilitating
17 settlement with individual PRPs, the Trustees have developed a proposal for allocating liability for
18 the 1526.77 DSAYs among the PRPs. Independent consultants hired by the Trustees reviewed
19 existing information from the files of EPA, the Washington State Department of Ecology, and local
20 public libraries to allocate liability among the various Hylebos Waterway facilities that contributed
21 to the contamination.

22 L. To insure that all PRPs had an equal opportunity to be informed of and to offer their
23 views on the Trustees' settlement proposal, in April 2002 the Trustees presented their report on the
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1 proposed allocation to the public for notice and comment. The Trustees took comments for 60 days,
2 revised the report based upon the comments received, and made it available to PRPs in final form.
3

4 M. After evaluating available information, the Trustees have determined, solely for
5 purposes of this settlement and without any bearing on or applicability in any other context, that
6 Defendants should be allocated liability for a total of 271.89 DSAY losses and \$1,607,920.62 in
7 damage assessment costs as a consequence of Defendants' respective industrial and commercial
8 processes and activities resulting in alleged hazardous substance releases to the Commencement Bay
9 Environment in connection with the above-named facilities.
10

11 N. In settlement of this action Defendant Occidental Chemical Corporation
12 ("Occidental"), on behalf of all Defendants, has agreed, in lieu of and as equivalent to monetary
13 damages, to cause real property owned by the Port of Tacoma to be set aside for the purpose of
14 natural resource restoration, and to implement thereon the habitat restoration project described in
15 Appendix A ("East 11th Street Tideflats Restoration Project" or "Project"), attached hereto and by
16 this reference incorporated herein. Occidental has also agreed to contribute funds to support project
17 oversight by the Trustees, and to reimburse natural resource damage assessment costs incurred by
18 the Trustees as provided by Sections XII and XIII.
19

20 O. The Trustees have determined that the timely actions and expenditures to be
21 undertaken and payments to be made by Occidental under this Consent Decree are appropriate and
22 necessary to protect and restore the natural resources allegedly injured as a result of actions or
23 omissions of Defendants that are addressed herein, and that such timely actions, expenditures and
24 payments are adequate to redress Defendants' responsibility for the Natural Resource Damages that
25 are the subject of this proceeding.
26

1 P. Defendants do not admit any liability to Plaintiffs arising out of the transactions or
2 occurrences alleged in the Complaint and the matters alleged in this Consent Decree.
3

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

8 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

9 III. JURISDICTION AND VENUE

10 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.
11 §§ 1331, 1345 and 1367, and 42 U.S.C. §§ 9607 and 9613(b) and 33 U.S.C. § 2717(b). The Court
12 has personal jurisdiction over the Parties. Solely for the purposes of this Decree and the underlying
13 Complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the
14 Court or to venue in this District. The Parties may not challenge the terms of this Decree or this
15 Court's jurisdiction to enter and enforce this Decree.

16 IV. PARTIES BOUND

17 2. This Decree is binding upon the United States, the State, the Puyallup Tribe of
18 Indians, the Muckleshoot Indian Tribe, each Defendant and their heirs, successors and assigns. Any
19 change in ownership or corporate or other legal status, including but not limited to any transfer of
20 assets or real or personal property, will in no way alter the status or responsibilities of the Parties
21 under this Decree.

22 3. Occidental shall provide a copy of this Consent Decree to each contractor hired to
23 perform work required by this Consent Decree and to each person representing Occidental with
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1 respect to any such work, and shall condition all contracts entered into hereunder upon performance
2 of the work in conformity with the terms of this Consent Decree. Occidental or its contractors shall
3 provide written notice of the Consent Decree to all subcontractors hired to perform any portion of
4 the work. Occidental shall nonetheless be responsible for ensuring that all such work, including that
5 performed by contractors and subcontractors, is performed in accordance with this Consent Decree.
6

V. DEFINITIONS

8 4. Unless otherwise expressly provided, terms used in this Decree that are defined in
9 CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in
10 CERCLA or in such regulations. Whenever the terms listed below are used in this Decree or in any
11 attached appendix, the following definitions will apply:

13 a. “Commencement Bay Environment” means the waters of Commencement Bay,
14 State of Washington -- including the shoreline, intertidal areas, tributaries, drainage areas, estuaries
15 and bottom sediments -- lying south of a line drawn from Point Defiance to Dash Point. These waters
16 include the Thea Foss Waterway, Wheeler-Osgood Waterway, Middle Waterway, St. Paul Waterway,
17 Puyallup River from the mouth south to the present City limits, Milwaukee Waterway, Sitzcum
18 Waterway, Blair Waterway, and Hylebos Waterway. This area includes but is not limited to the
19 Commencement Bay Nearshore/Tideflats Superfund Site, as identified or amended by the EPA,
20 including the B&L Landfill, and areas affected by releases of hazardous substances within the
21
22 Commencement Bay Nearshore/Tideflats Superfund Site.

24 b. “Commencement Bay Restoration Account” means the Commencement Bay
25 Natural Resource Restoration Account authorized by the Order Directing the Deposit of Natural
26 Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No.

1 C93-5462B (W.D. Wash. Oct. 8, 1993) (attached as Appendix B).

2 c. “Consent Decree” or “Decree” means this Consent Decree and all attached
3 appendices listed in Section XXVII.

4 d. “Day” means a calendar day. In computing any period of time under this
5 Consent Decree, where the last day falls on a Saturday, Sunday or federal holiday, the period of time
6 will run until the close of business of the next working day.

7 e. “DSAYs” means discounted ecological service acre-years, the metric
8 established by the Trustees to determine the scale of Natural Resource Damages liability associated
9 with the Hylebos Waterway and the natural resource restoration efforts needed to compensate for
10 injury to, destruction or loss of natural resources giving rise to liability.

11 f. “Defendant” means each one of, and “Defendants” means all of, Occidental
12 Chemical Corporation, Pioneer Americas, LLC, Mariana Properties, Inc., Detrex Corporation,
13 Sound Refining, Inc., and SRI Acquisition Corporation.

14 g. “Natural Resource Damages” means damages, including costs of damage
15 assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW;
16 Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil
17 Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A), for injury to, destruction of, or loss of
18 natural resources resulting from releases of hazardous substances or discharges of oil to the
19 Commencement Bay Environment at or from sites along, adjacent to or draining to the Hylebos
20 Waterway.

21 h. “Parties” mean the United States, the State of Washington, the Puyallup Tribe
22 of Indians, the Muckleshoot Indian Tribe and Defendants.

i. "Plaintiffs" means the United States, the State, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe.

j. "Project" means the East 11th Street Tideflats Restoration Project described in Appendix A.

k. "Project Site" means the approximately 19 acres of real property, a portion of Pierce County tax parcel 0321263043, extending up to elevation +11.8 feet above mean lower low water indicated on Figure 1 in Appendix A, adjacent to the Hylebos Waterway and near East Eleventh Street in Tacoma, Washington, that is owned by the Port of Tacoma and on which the Project is to be implemented according to the terms of this Consent Decree.

- l. "Tribal Land Groundwater Plume" means that zone of groundwater that proceeds beneath the bed of the Hylebos Waterway and enters within land held in trust by the United States for the Puyallup Tribe of Indians and land that is owned in fee by the Puyallup Tribe of Indians, that contains elevated concentrations of chlorinated organic compounds and other contaminants defined as hazardous substances under CERCLA or any applicable Tribal Ordinance or Resolution creating Tribal Law.

m. "Trustees" mean the United States Department of Commerce, acting through NOAA; the Department of the Interior; the Washington State Department of Ecology, on behalf of the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe.

VI. GENERAL PROVISIONS

5. The Complaint states claims upon which relief may be granted.

6. Nothing in this Consent Decree shall be construed as an admission of liability by the Defendants for any claims or allegations made in the Complaint or in this Consent Decree.

1 7. Except where otherwise expressly provided, Occidental shall be responsible for
2 performing the obligations undertaken by Defendants under this Consent Decree.

3 8. All activities undertaken by Occidental pursuant to this Consent Decree shall be
4 performed in accordance with the requirements of all applicable laws and permits.

5 9. All work performed by Occidental and/or its contractors under this Consent Decree
6 shall be conducted pursuant to the design and schedule approved by the Trustees in Appendix A
7 attached hereto and shall be subject to full oversight by the Trustees. If the Trustees determine that
8 Occidental is not complying with the design and schedule set forth in Appendix A, the Trustees shall
9 provide prompt written notice to Occidental specifying the basis for their determination of
10 noncompliance. Occidental may correct the noncompliance or invoke the dispute resolution
11 procedures set forth in Section XV below. Subject to the right of Occidental to invoke the dispute
12 resolution provisions, the Trustees may require Occidental to take actions, to alter, suspend or cease
13 ongoing activities, and to alter, postpone or refrain from taking proposed actions, as the Trustees
14 reasonably deem necessary to ensure compliance with the terms of this Consent Decree and any plans
15 or proposals adopted hereunder.

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

18 11. Where any portion of the activities undertaken pursuant to this Consent Decree
19 requires a federal, state or local permit or approval, Occidental shall submit timely and complete
20 applications and take all other actions necessary to obtain all such permits or approvals as provided
21 in Appendix A attached hereto. Occidental shall use best efforts to obtain any necessary permits.

22 12. The Plaintiffs do not, by their consent to the entry of this Consent Decree, warrant or

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

VII. PROJECT SITE

8 13. The Port of Tacoma, as the owner of the Project Site, has recorded deed restrictions
9 for the Project Site, attached as Appendix C hereto, that are intended to prohibit log rafting and
10 protect the site for use as a habitat conservancy in perpetuity.
11

VIII. PROJECT DEVELOPMENT

13 14. Occidental shall provide the funds and services and take all necessary steps to
14 implement the Project in accordance with the details, specifications and project development schedule
15 set out in Appendix A, which are incorporated into this Consent Decree by this reference.

17 15. Occidental shall avoid taking any action on the Project Site property or adjacent
18 property owned or controlled by Occidental that is inconsistent with this Consent Decree and that
19 would interfere with the Project such that it would substantially decrease the likelihood of success
20 of the Project. Occidental shall notify the Trustees in writing at least 30 days prior to entering into
21 any contracts for or applying for any permits for the taking of any actions on the Project Site other
22 than those identified in Appendix A. Such notice shall include a narrative description of the proposed
23 actions plus a site diagram indicating the location of the proposed actions. Occidental may undertake
24 such actions only after consultation with and concurrence by the Trustees. Such concurrence shall
25 not unreasonably be withheld and shall be provided by the Trustees unless the proposed actions
26

1 would interfere with the Project such that the actions would substantially decrease the likelihood of
2 success of the Project.

3 16. Within 60 days after completion of construction of the Project, as provided by
4 Paragraph 3(h) of Appendix A, Occidental shall submit a written Notice of Completion to the
5 Trustees. The Trustees shall review the course and results of the development of the Project to
6 determine whether the Project has been completed in accordance with Appendix A. Within 60 days
7 after receiving the Notice of Completion, the Trustees shall submit to Occidental either (a) a written
8 notice identifying specific deficiencies the Trustees determine must be satisfied for the Project to be
9 completed in accordance with Appendix A (Notice of Deficiencies); or (b) a written notice of the
10 Trustees' determination that the Project has been so completed (Notice of Approval of Completion).
11 Following receipt of a Notice of Deficiencies, Occidental shall correct the identified deficiencies and
12 complete the Project in accordance with Appendix A, and submit to the Trustees an amended Notice
13 of Completion for review and response in accordance with this Paragraph. Any delay in completing
14 Project construction as a result of the operation of this Paragraph shall not in and of itself constitute
15 grounds for relief from the requirement to pay stipulated penalties under Section XVI for compliance
16 delays.

17 17. Within 60 days following receipt of the Trustees' Notice of Approval of Completion
18 for the Project, Occidental shall submit to the Trustees a Project Completion Accounting. The Project
19 Completion Accounting shall itemize the costs of design, permitting, construction, monitoring and
20 maintenance incurred by Occidental in implementing the Project and contain an estimate of the costs
21 of carrying out the future actions needed to comply with the Project requirements of Appendix A.

22 IX. POST-CONSTRUCTION ALTERATIONS:
23 FURTHER RESTORATION ACTIONS

1 18. In addition to any measures undertaken in connection with the Project requirements
2 identified in Appendix A, following construction of the Project the Trustees may at any time make
3 such post-construction alterations or implement such further restoration actions on the Project site,
4 consistent with the Project, as they determine appropriate. Such post-construction alterations or
5 further restoration actions shall only be taken with the agreement of and in coordination with
6 Occidental and the Port of Tacoma, which agreement shall not be unreasonably withheld and shall
7 be provided unless the proposed alterations or further restoration actions would substantially interfere
8 with Occidental's compliance with the requirements of this Consent Decree or permits applicable to
9 the Project, or would impose unreimbursed costs upon Occidental or the Port of Tacoma, or would
10 interfere in any way with other restoration, mitigation or habitat improvement actions anticipated by
11 Occidental and/or the Port of Tacoma.

X. ACCESS TO INFORMATION AND PROJECT SITE

16 19. To facilitate their oversight responsibilities, the Trustees shall have full access to all
17 work in progress at the Project Site required under this Consent Decree.

18 20. Port of Tacoma, as the owner of the Project Site, has agreed to provide the Trustees,
19 Occidental, and their respective contractors access to the Project Site pursuant to an access
20 agreement in the form of Appendix E hereto.

21. Occidental and the Port of Tacoma shall have the right to accompany any Trustee or
22 its representative on the Project Site. Anyone provided access through this Consent Decree shall
23 comply with applicable health and safety requirements and shall not interfere with ongoing operations.
24

XI. SELECTION OF CONTRACTORS

22. The selection of any contractor retained by Occidental to perform any of the work

1 required under this Consent Decree shall be subject to Trustee approval. Occidental shall notify the
2 Trustees in writing of the name, title and qualifications of any proposed contractor, and of any
3 proposed changes in the selection of a contractor. The Trustees will notify Occidental in writing of
4 the approval or disapproval of a proposed contractor. Occidental shall also notify the Trustees of any
5 proposed subcontractor and of any proposed changes in the selection of a subcontractor to be
6 retained to perform any of the work required under this Consent Decree. The Trustees' assent to the
7 proposed selection or change of a subcontractor may be presumed unless the Trustees notify
8 Occidental in writing of their objection to the proposed selection or change within 45 days of
9 Occidental's written selection notice.
10

11 XII. REIMBURSEMENT OF RESTORATION OVERSIGHT COSTS

12 23. Occidental shall reimburse Trustee costs incurred in the oversight of all aspects of the
13 implementation of the Project, and incurred in all aspects of the preparation and implementation of
14 this Consent Decree, in the total amount of \$50,000.00. Sums paid under this Paragraph shall be
15 deposited in the Commencement Bay Restoration Account for use as the Trustees shall determine in
16 accordance with the terms of this Consent Decree and other applicable law. Payment shall be
17 deposited within 30 days following the entry of this Consent Decree with the Registry of the Court
18 by certified check, bearing the notation "Occidental Chemical et al. - Oversight Costs" and the civil
19 action number assigned to this Consent Decree, made payable and addressed as follows:
20
21

22 Payee: Clerk of the Court
23

24 Address: Clerk, U.S. District Court
25 U.S. Courthouse, Room 215
26 1010 Fifth Avenue
27 Seattle, WA 98104
28

1 Memo: For Deposit into the Commencement Bay Natural Resource Restoration Account
2 C93-5462 [INSERT THIS CASE DOCKET NUMBER]
3
4 Occidental shall send photocopies of each check and any transmittal letter to: Chief, Environmental
5 Enforcement Section, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C.
6 20044; and to Robert A. Taylor, NOAA GCNR/NW, 7600 Sand Point Way NE, Seattle, WA 98115-
7 0070. Any funds paid pursuant to this Paragraph that are not utilized by the Trustees to cover
8 oversight costs or costs of further maintenance, monitoring or adaptive management for the Project
9 may be applied by the Trustees toward one or more additional restoration projects in the
10 Commencement Bay Environment.

XIII. PAST COST REIMBURSEMENT

16 Trustee: National Oceanic and Atmospheric Administration
17 Amount: \$1,250,382.63

18 Trustee: U.S. Department of the Interior
19 Amount: \$209,046.38

Payments to NOAA and the U.S. Department of the Interior shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures. Payment shall be made in accordance with instructions provided to Occidental by the Financial Litigation Unit of the U.S. Attorney's Office of the Western District of Washington. Any payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall be credited on the next business day. Occidental shall provide at least five days notice to the Financial

1 Litigation Unit before making the transfer.

2 Payments to the other Trustees shall be made by certified checks, bearing the notation
3 "Occidental Chemical et al. - Commencement Bay Assessment Costs," in the amounts indicated and
4 made payable and addressed as follows:

5 Trustee: State of Washington

6 Amount: \$25,794.75

7 Payee: State of Washington/Department of Ecology

8 Address: State of Washington

9 Department of Ecology

10 Attention: Cashiering Section

11 P.O. Box 5128

12 Lacey, WA 98503-0210

13 Trustee: Puyallup Tribe of Indians

14 Amount: \$59,014.08

15 Payee: Puyallup Tribe of Indians

16 Address: Mr. William Sullivan

17 Environmental Protection Department

18 Puyallup Tribe of Indians

19 3009 E. Portland Ave.

20 Tacoma, WA 98404

21 Trustee: Muckleshoot Indian Tribe

22 Amount: \$5,762.15

23 Payee: Muckleshoot Indian Tribe

24 Address: Mr. Rob Otsea

25 Office of the Tribal Attorney

26 Muckleshoot Indian Tribe

27 39015 172nd Avenue S.E.

28 Auburn, WA 98002

25 At the time of each payment Occidental will send notice that payment has been made
26 to the Trustees and DOJ in accordance with Section XXIV (Notices and Submissions). Such notice
27

1 will reference Commencement Bay NRDA, DOJ case number 90-11-2-1049, and the civil action
2 number.

3 XIV. FAILURE TO MAKE TIMELY PAYMENTS

4 26. If Occidental fails to make any payment under Paragraphs 23 and 24 by the required
5 due date, interest shall be assessed at the rate specified for interest on investments of the EPA
6 Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October
7 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in
8 effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each
9 year. Interest will continue to accrue on the unpaid balance through the date of payment.
10
11

12 XV. DISPUTE RESOLUTION

13 27. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution
14 procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with
15 respect to this Consent Decree.
16

17 28. Any dispute which arises under or with respect to this Consent Decree shall in the first
18 instance be the subject of informal negotiations between the Trustees and Occidental. The period for
19 informal negotiations shall not exceed twenty-one (21) days from the time the dispute arises, unless
20 the parties to the dispute agree otherwise in writing. The dispute shall be considered to have arisen
21 when the Trustees send Occidental a written notice specifying the nature of the dispute and requested
22 relief (“Notice of Dispute”) or Occidental sends the Trustees a written Notice of Dispute.
23

24 29. a. If the Trustees and Occidental cannot resolve a dispute by informal
25 negotiations under the preceding Paragraph, then the position advanced by the Trustees shall be
26 considered binding unless, within twenty-one (21) days after the conclusion of the informal
27
28

1 negotiation period, Occidental invokes the formal dispute resolution procedures of this Section by
2 serving on the Trustees a written Statement of Position on the matter in dispute, including, but not
3 necessarily limited to, any factual data, analysis or opinion supporting that position and any
4 supporting documentation relied upon by Occidental. Occidental's Statement of Position shall include
5 the identification of a management-level representative who has not previously been involved in the
6 dispute, who shall serve as Occidental's Formal Dispute Resolution Representative.

7

8 b. Within twenty-one (21) days after receipt of Occidental's Statement of
9 Position, the Trustees shall serve on Occidental their written Statement of Position, including, but not
10 necessarily limited to, any factual data, analysis or opinion supporting that position and all supporting
11 documentation relied upon by the Trustees. The Trustees' Statement of Position shall include the
12 identification of one or more management-level representatives who have not previously been
13 involved in the dispute who shall serve as the Trustees' Formal Dispute Resolution Representative(s).

14

15 c. An administrative record of the dispute shall be maintained by the Trustees and
16 shall contain all Statements of Position, including supporting documentation, submitted pursuant to
17 this Section.

18

19 d. The Formal Dispute Resolution Representatives for Occidental and the
20 Trustees shall meet to discuss the matter in dispute at the earliest available opportunity and will work
21 in good faith to resolve the matter in dispute. If the Trustees and Occidental fail to resolve the dispute
22 within twenty-one (21) days after the initial meeting of the Formal Dispute Resolution
23 Representatives, then the position advanced by the Trustees in their Statement of Position shall be
24 considered binding upon Occidental, subject to any agreements the Formal Dispute Resolution
25 Representatives may have reached on one or more issues and further subject to Occidental's right to
26

1 seek judicial review pursuant to the following subparagraph. In such event the Trustees shall within
2 five (5) days of the conclusion of the formal dispute resolution process notify Occidental in writing
3 that the formal dispute resolution process has concluded.

4

5 e. Any matter in dispute shall be reviewable by this Court, provided that a motion
6 for judicial review of the decision is filed by Occidental with the Court and served on all Parties within
7 twenty-one (21) days of receipt of the Trustees' letter notifying Occidental of the conclusion of the
8 formal dispute resolution process. The motion shall include a description of the matter in dispute, the
9 relief requested and the schedule, if any, within which the dispute must be resolved to ensure orderly
10 implementation of this Consent Decree. The Plaintiffs may file a response to Occidental's motion
11 within twenty-one (21) days of receipt of the motion or within any different time frame that the local
12 rules of court may provide, and Occidental may file a reply brief within five (5) days of receipt of the
13 response or such different time that the local rules of court may provide.

14

15 f. The Court may rule based on the written record, with or without oral
16 argument. The burden of proving entitlement to the requested relief with respect to the matter in
17 dispute shall be on the Party requesting it.

18

19 g. The foregoing notwithstanding, the Trustees and Occidental acknowledge that
20 disputes may arise that require resolution on an expedited basis. In such cases, the Trustees and
21 Occidental shall agree on an expedited schedule or, absent prompt agreement, either the Occidental
22 or the Trustees may petition the Court for the imposition of an expedited schedule.

23

24 30. The invocation of formal dispute resolution procedures under this Section shall not
25 extend, postpone or affect in any way any obligation of any Party under this Consent Decree not
26 directly in dispute or contingent on issues in dispute, unless the Trustees or the Court agrees

1 otherwise. Occidental's obligations to pay stipulated penalties as provided in Section XVI with
2 respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution
3 of the dispute. Notwithstanding the stay of payment, the obligation to pay stipulated penalties shall
4 accrue from the first day of noncompliance with any applicable provision of this Consent Decree,
5 subject to the agreement of the Trustees and Occidental or to the decision of the Court on
6 Occidental's motion. If Occidental does not prevail on a disputed issue, stipulated penalties shall be
7 assessed and paid as provided in Section XVI.

8

9 **XVI. STIPULATED PENALTIES**

10

11 31. The Parties stipulate that time is of the essence in the implementation of the
12 requirements of this Consent Decree and that delays in carrying out the activities required herein may
13 diminish the compensatory value attributable to those activities. Consequently, in the event that
14 Occidental exceeds the deadline provided for one of the activities described below (subject to any
15 modifications agreed to under Section XXVIII) and such delay is not excused through operation of
16 the dispute resolution provisions (Section XV) and/or the force majeure provisions (Section XVII),
17 Occidental shall, as a stipulated penalty, increase the financial contributions it makes under this
18 Consent Decree to fund habitat restoration actions, over and above any payments required elsewhere
19 under this Consent Decree, as follows:

20

21 a. For each week Occidental fails to comply with a deadline provided in the
22 Paragraph 23 or 24 for making any payment; the Project Development Schedule included in Appendix
23 A for accomplishing a major milestone for the Project; under Paragraph 16 for submitting a Notice
24 of Completion; under Paragraph 17 for submitting a Project Completion Accounting; or under
25 Paragraph 39 for providing copies of certificates of insurance and insurance policies, Occidental shall
26

1 pay a stipulated penalty in the amount of \$1,000. Where the delay extends beyond the second week,
2 the stipulated penalty shall apply to each additional day of delay for each such missed deadline. For
3 purposes of this subparagraph, a week shall equal a continuous period of seven days.
4

5 b. Stipulated penalties are due and payable within 30 days of the date of the
6 demand for payment of the penalties by the Trustees. All payments to the Trustees under this
7 Paragraph will be made by a certified check made payable to the Clerk of the Court. This check will
8 be deposited in the Commencement Bay Restoration Account.
9

10 c. At the time of each payment, Occidental will send notice that payment has been
11 made to the Trustees and DOJ in accordance with Section XXIV (Notices and Submissions). This
12 notice will reference Commencement Bay NRDA, DOJ Case Number 90-11-2-1049, and the civil
13 action number.
14

15 d. Penalties will accrue as provided in this Paragraph regardless of whether the
16 Trustees have notified Occidental of the violation or made a demand for payment or performance,
17 but the penalties need only be paid upon demand. All penalties will begin to accrue on the day after
18 payment or performance is due and will continue to accrue through the date of payment or
19 performance. Nothing in this Decree prevents the simultaneous accrual of separate penalties for
20 separate violations of this Decree.
21

22 e. Occidental may dispute the Trustees' right to the penalties identified under
23 subparagraph a. above by invoking the dispute resolution procedures of Section XV.
24

25 32. If Plaintiffs bring an action in Court to enforce this Decree, Occidental will reimburse
26 Plaintiffs for all costs of such action, including but not limited to costs of attorney time.
27

28 33. Payments made under this Section are in addition to any other remedies or sanctions
29

available to Plaintiffs by virtue of Occidental's failure to comply with the requirements of this Decree.

34. Notwithstanding any other provision of this Section, Plaintiffs may, in their unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree. Payment of stipulated penalties does not excuse Occidental from payment as required by Sections XII or XIII or from performance of any other requirement of this Consent Decree.

35. The Trustees may use sums paid as stipulated penalties under Paragraph 31 to pay unreimbursed damage assessment costs and/or to fund or contribute to additional actions to restore Commencement Bay natural resources.

XVII. FORCE MAJEURE

36. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Occidental that delays or prevents the performance of any obligation under this Consent Decree despite Occidental's best efforts to fulfill the obligation. The requirement that Occidental exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and 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.

37. a. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Occidental shall notify the Trustees within 14 days of when Occidental first knew that the event might cause a delay. Within 30 days thereafter, Occidental shall provide a written explanation and description of the

1 reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent
2 or minimize the delay; a schedule for implementation of any measures to be taken to prevent or
3 mitigate the delay or the effect of the delay; and the rationale for attributing such delay to a force
4 majeure event, if Occidental intends to assert such a claim. Occidental shall include with any notice
5 all available documentation supporting its claim that the delay was attributable to a force majeure
6 event. Failure to comply with the above requirements will preclude Occidental from asserting any
7 claim of force majeure for that event.

8

9 b. If the Trustees agree that the delay or anticipated delay is attributable to a
10 force majeure event, the time for performance of the obligations under this Consent Decree that are
11 affected by the force majeure event will be extended by the Trustees for such time as is necessary. An
12 extension of the time for performance of the obligations affected by the force majeure event shall not,
13 of itself, extend the time for performance of any other obligation. If the Trustees do not agree that
14 the delay or anticipated delay has been or will be caused by a force majeure event, the Trustees will
15 notify Occidental in writing of their decision.

16

17 c. If Occidental elects to invoke the dispute resolution procedures set forth in
18 Section XV, above, regarding a claimed force majeure event it shall do so no later than 30 days after
19 receipt of the Trustees' notice of disagreement. In any such proceeding Occidental shall have the
20 burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has
21 been or will likely be caused by a force majeure event, that the duration of the delay or the extension
22 sought was or will be warranted under the circumstances, that Occidental exercised best efforts to
23 fulfill the obligation in question, and that Occidental complied with the requirements of this
24 Paragraph. If Occidental carries this burden, the delay at issue shall be deemed not to be a violation
25

1 by Occidental of the affected obligation of this Consent Decree.

2 **XVIII. INDEMNIFICATION; INSURANCE**

3 38. a. Occidental shall indemnify for and hold harmless each of the Plaintiffs and/or
4 their agents, employees and representatives from any and all damage claims or causes of action arising
5 from acts or omissions of Occidental and/or its officers, employees, agents, contractors,
6 subcontractors, representatives and any persons acting on its behalf or under its control, in carrying
7 out the requirements of this Consent Decree. Further, Occidental agrees to pay the Plaintiffs all costs
8 they incur, including but not limited to attorneys fees and other expenses of litigation and settlement,
9 arising from or on account of damage claims made against the Plaintiffs based on acts or omissions
10 of Occidental or its officers, employees, agents, contractors, subcontractors, representatives and any
11 persons acting on their behalf or under its control, in carrying out the requirements of this Consent
12 Decree. None of the Plaintiffs shall be held out as a party to any contract entered into by or on behalf
13 of Occidental in carrying out the requirements of this Consent Decree. Neither Occidental nor any
14 such contractor or representative shall be considered an agent of any Plaintiff, and Occidental shall
15 require any contractor carrying out the requirements of this Consent Decree to affirmatively
16 acknowledge that it is not acting as an agent of any Plaintiff.
17

18 b. Occidental waives, and shall indemnify and hold harmless each of the Plaintiffs
19 with respect to, any claims for damages or reimbursement from the Plaintiffs or for set-off against any
20 payments made or to be made to the Plaintiffs, arising from or on account of any contract, agreement
21 or arrangement between Occidental and any person in carrying out the requirements of this Consent
22 Decree, including claims on account of construction delays.
23

24 39. Occidental shall secure and maintain until receiving the Trustees' Notice of Approval
25

1 of Completion comprehensive general liability insurance and automobile liability insurance with limits
2 of \$10,000,000 (ten million dollars), combined single limit, naming the United States, the State, the
3 Puyallup Tribe of Indians and the Muckleshoot Indian Tribe as additional insureds. In addition, for
4 the duration of this Consent Decree Occidental shall satisfy, or shall ensure that its contractors or
5 subcontractors satisfy, all applicable law and regulations regarding the provision of worker's
6 compensation insurance for all persons performing any work involved in implementing this Consent
7 Decree. No later than 15 days before commencing any work involved in implementing this Consent
8 Decree, Occidental shall provide to the Trustees certificates of such insurance and a copy of each
9 insurance policy. Occidental shall resubmit such certificates and copies of policies each year on the
10 anniversary of the effective date of this Consent Decree. If Occidental demonstrates by evidence
11 satisfactory to the Trustees that any contractor or subcontractor maintains insurance equivalent to
12 that described above, or insurance covering the same risks but in a lesser amount, then, with respect
13 to that contractor or subcontractor, Occidental need provide only that portion of the insurance
14 described above that is not maintained by the contractor or subcontractor.
15

16 40. The Trustees agree to require that any contractor who performs work for them in the
17 Project area shall agree to indemnify and hold harmless Occidental and the Port of Tacoma and their
18 agents, employees and representatives, against all claims of any nature, including, but not limited to,
19 claims by third parties for death, personal injury, or property damage, and claims for environmental
20 liability that arise as the result of negligent acts or omissions of such contractor, its employees,
21 representatives and agents in carrying out the provisions of this Consent Decree. Such indemnity shall
22 be limited to actual damages only, and shall not extend to consequential damages or any other liability
23 except as stated herein.
24

XIX. COVENANT NOT TO SUE BY PLAINTIFFS

41. Except as specifically provided in Section XX (Reservations of Rights) below, Plaintiffs covenant not to sue or to take administrative action against Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; or Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(a), to recover Natural Resource Damages. This covenant not to sue will take effect upon entry of this Consent Decree by the Court and continue in effect conditioned upon the satisfactory performance by Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to each Defendant and its heirs, successors and assigns, and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS

42. Plaintiffs reserve, and this Decree is without prejudice to, all rights against any Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiffs in Paragraph 41. Notwithstanding any other provision of this Decree, Plaintiffs reserve, and this Decree is without prejudice to, all rights against each Defendant with respect to:

- a. liability for failure of the Defendant to meet a requirement of this Decree;
 - b. liability for costs of response incurred or to be incurred by Plaintiffs, provided, however, that nothing in this subparagraph b. shall be deemed to supersede or conflict with the provisions of the consent decree entered in United States v. Port of Tacoma, et al., W.D. Wash. Case number C05-5103FDB;
 - c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability to the United States or State.

43. Furthermore, notwithstanding any other provision of this Consent Decree, the Puyallup Tribe of Indians and the United States (in its capacity as trustee for the Puyallup Tribe of Indians) reserve, and this Decree is without prejudice to, all rights against each Defendant with respect to liability for Natural Resource Damages, including the costs of damage assessment, recoverable by the Puyallup Tribe of Indians or by the United States in its capacity as trustee for the Puyallup Tribe of Indians, resulting from hazardous substance contamination of the Tribal Land Groundwater Plume.

XXI. REOPENERS

44. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, and this Consent Decree is without prejudice to, the right to institute proceedings against each Defendant in this action or in a new action for:

- a. Claims based on a failure of the Defendant to satisfy the requirements of this Consent Decree; and

b. Additional claims for Natural Resource Damages if conditions, factors or information in the Commencement Bay Environment, not known to the Trustees at the time of entry of this Consent Decree, are discovered that, together with any other relevant information, indicates that there is injury to, destruction of, or loss of natural resources of a type unknown, or of a magnitude significantly greater than was known, at the time of entry of this Consent Decree, which is attributable to the Defendants. For purposes of this subparagraph, information known to the Trustees shall consist of any information in the files of, or otherwise in the possession of any one of the individual Trustees, or their contractors or consultants who worked on the Trustees' natural

1 resource damages assessment and liability allocation projects. The parties stipulate that the
2 information known to the Trustees at the time of entry of this Consent Decree regarding
3 contamination of groundwater beneath the Hylebos Waterway (including but not limited to the Tribal
4 Land Groundwater Plume) for which Plaintiffs assert Defendants are responsible shall consist of the
5 data and assumptions drawn therefrom disclosed to the Trustees at a briefing on July 11, 2006, as set
6 forth in Appendix D.

8 XXII. COVENANT NOT TO SUE BY DEFENDANTS

9 45. Each Defendant covenants not to sue and agrees not to assert any claims or causes
10 of action against the United States, the State, the Puyallup Tribe of Indians and the Muckleshoot
11 Indian Tribe or their contractors or employees, for any civil claims or causes of action relating to
12 Natural Resource Damages. Notwithstanding the preceding sentence of this Paragraph 45, in the
13 event that the Puyallup Tribe of Indians or the United States in its capacity as trustee for the Puyallup
14 Tribe of Indians brings an action pursuant to the reserved rights under Paragraph 43 to recover
15 Natural Resource Damages, including the costs of damage assessment, resulting from hazardous
16 substance contamination of the Tribal Land Groundwater Plume, Defendants reserve, and this
17 Consent Decree is without prejudice to, any contribution claims, defenses or limitations pertaining
18 to the claims asserted in such action by the Puyallup Tribe and/or the United States. Defendants'
19 reserved contribution claims, defenses or limitations may not be asserted with regard to Natural
20 Resource Damages, including the costs of damage assessment, other than those sought in such action
21 by the Puyallup Tribe and/or the United States resulting from hazardous substance contamination of
22 the Tribal Land Groundwater Plume. Nothing in this Paragraph 45 shall be deemed to supersede or
23 conflict with the provisions of the consent decree entered in State of Washington, et al., v. United
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1 States, W.D. Wash. Case number C06-05225RJB.

2 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

3 46. Nothing in this Consent Decree shall be construed to create any rights in, or grant any
4 cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly
5 reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims,
6 demands, and causes of action they each may have with respect to any matter, transaction, or
7 occurrence relating in any way to the Commencement Bay Environment against any person not a
8 Party hereto.

9 47. The Parties agree, and by entering this Consent Decree this Court finds, that each
10 Defendant is entitled, as of the effective date of this Consent Decree, to protection from contribution
11 actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW
12 70.105D.040(4)(d), for Natural Resource Damages.

13 48. Each Defendant agrees that it will notify the Trustees and the United States in writing
14 no later than 60 days before bringing a suit or claim for contribution for Natural Resource Damages.
15 Each Defendant also agrees that it will notify the Trustees and the United States in writing within 10
16 days of service of a complaint or claim upon it relating to a suit or claim for contribution for Natural
17 Resource Damages. In addition, each Defendant will notify the Trustees and the United States within
18 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of
19 any order from a court setting a case for trial for matters related to this Decree.

20 49. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for
21 injunctive relief, recovery of response costs, or other appropriate relief other than Natural Resource
22 Damages, no Defendant shall assert, nor may it maintain, any defense or claim based upon the
23

1 principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other
2 defenses based upon any contention that the claims raised by the Plaintiffs in the subsequent
3 proceeding were or should have been brought in the instant case; provided, however, that nothing
4 in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraphs 41 and
5
6 45.

7 XXIV. NOTICES AND SUBMISSIONS

8 50. Whenever notice is required to be given or a document is required to be sent by one
9 Party to another under the terms of this Decree, it will be directed to the individuals at the addresses
10 specified below, unless those individuals or their successors give notice of a change to the other
11 Parties in writing. Written notice as specified constitutes complete satisfaction of any written notice
12 requirement of the Decree for Plaintiffs and Defendants.
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1 As to the United States and as to DOJ:
2
3 Chief, Environmental Enforcement Section
4 Environment and Natural Resources Division
5 U.S. Department of Justice
6 P.O. Box 7611
7 Washington, D.C. 20044-7611
8 (DJ # 90-11-2-1049)

9 As to NOAA:

10 Robert A. Taylor
11 NOAA Office of General Counsel GCNR/NW
12 7600 Sand Point Way NE
13 Seattle, WA 98115-0070

14 As to the United States Department of the Interior:

15 Jeff Krausmann
16 U.S. Fish & Wildlife Service
17 510 Desmond Dr. SE, Suite 102
18 Lacey, WA 98503-1263

19 As to the State:

20 Craig Thompson
21 Toxics Cleanup Program
22 State of Washington
23 P.O. Box 47600
24 Olympia, WA 98504-7600

25 As to the Puyallup Tribe of Indians:

26 Bill Sullivan
27 Environmental Department
28 Puyallup Tribe of Indians

1 3009 E. Portland Ave.
2 Tacoma, WA 98404

3 As to the Muckleshoot Indian Tribe:

4
5 Mr. Rob Otsea
6 Office of the Tribal Attorney
7 Muckleshoot Indian Tribe
8 39015 172nd Avenue S.E.
Auburn, WA 98002

9 As to Occidental Chemical Corporation:

10 Occidental Chemical Corporation
11 c/o Vice President and General Counsel
12 Legal Department
13 Occidental Tower
14 5005 LBJ Freeway
Dallas, TX 75244

15 As to Mariana Properties, Inc.:

16
17 Mariana Properties Inc.
18 c/o Occidental Chemical Corporation
19 Vice President and General Counsel
20 Legal Department
21 Occidental Tower
22 5005 LBJ Freeway
Dallas, TX 75244

23 As to Pioneer Americas, LLC:

24 Pioneer Americas, LLC
25 c/o General Counsel
26 700 Louisiana, Suite 4300
Houston, TX 77002

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CONSENT DECREE - Page 36

U.S. Department of Justice
NOAA GC - DOJ DARC
7600 Sand Point Way NE
Seattle, WA 98115-0070
(206) 526-6616

1 As to Detrex Corporation:
2
3 Detrex Corporation
4 c/o General Counsel and Secretary
5 Suite 410
6 24901 Northwestern Highway
7 Southfield, MI 48075

8
9 As to Sound Refining, Inc.:
10

11
12 Troy Goodman
13 Sound Refining, Inc.
14 P.O. Box 1372
15 Tacoma, WA 98401

16 Bradley B. Jones
17 Gordon Thomas Honeywell
18 1201 Pacific Avenue, Suite 2200
19 P.O. Box 1157
20 Tacoma, WA 98401-1157

21 As to SRI Acquisition Corporation:
22

23 Troy Goodman
24 Sound Refining, Inc.
25 P.O. Box 1372
26 Tacoma, WA 98401

27 Bradley B. Jones
28 Gordon Thomas Honeywell
29 1201 Pacific Avenue, Suite 2200
30 P.O. Box 1157
31 Tacoma, WA 98401-1157

XXV. EFFECTIVE DATE

51. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXVI. RETENTION OF JURISDICTION

52. This Court will retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Decree.

XXVII. INTEGRATION/APPENDICES

53. 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 following appendices are attached to and incorporated into this Consent Decree:

Appendix A East 11th Street Tideflats Restoration Project Description

Appendix B Order Directing the Deposit of Natural Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No. C93-5462B (W.D. Wash. Oct. 8, 1993)

Appendix C Form of real property use restrictions

Appendix D Information Regarding Groundwater Issues

Appendix E Form of access agreement

XXVIII. MODIFICATION

54. No material modifications shall be made to any requirement under this Consent Decree without written notification to and written approval of the United States Department of Justice and

the Trustees, Defendants and the Court. Modifications to this Consent Decree exclusive of the
appendices incorporated within that do not materially alter the terms of this Consent Decree may be
made by written agreement between the United States Department of Justice, the Trustees and
Defendants. Modifications to any of the appendices to this Consent Decree that do not materially alter
any of the terms of this Consent Decree may be made by written agreement between the Trustees and
Occidental. The following modifications shall be deemed not to materially alter the terms of this
Consent Decree or the appendices incorporated herein:

- a. Extensions of deadlines for Project major milestones contained in Appendix A, provided that the total of such extensions shall equal one year or less;
 - b. Project design changes that increase the Project scale, or that decrease the Project scale by no more than 10% (ten percent) of the Project's area; or
 - c. Extensions of deadlines for reports, accounts, plans or proposals of 45 days or less.

XXIX. ENFORCEMENT

17 55. The requirements of this Consent Decree, including but not limited to deadlines,
18 schedules and Project designs, are independently enforceable and the delay or failure of the Trustees
19 to enforce any requirement will not preclude or prejudice the subsequent enforcement of the same
20 or another requirement.
21

XXX. TERMINATION

23 56. This Decree shall terminate upon written notice, made in accordance with Section
24 XXIV (“Notices and Submissions”), by Occidental to all Plaintiffs that all actions required under
25 Section VIII (“Project Development”) have been taken, all payments required under Sections XII and
26 XIII (and under Sections XIV and XVI, if applicable) have been made and all other applicable

1 requirements of this Decree have been fulfilled, and subsequent written notice by the United States
2 confirming the performance by Defendants of their obligations under this Decree. Such notice by the
3 United States shall be sent within 45 calendar days of receipt by all Plaintiffs of the required payments
4 and notice from Occidental. The following provisions of this Decree shall survive termination: Section
5 IX (“Post-Construction Alterations; Further Restoration Actions”); Section X (“Access to
6 Information and Project Site”); Section XIX (“Covenant Not to Sue by Plaintiffs”); Section XX
7 (“Reservation of Rights”); Section XXI (“Reopeners”); Section XXII (“Covenant Not to Sue by
8 Defendants”); and Section XXIII (“Effect of Settlement; Contribution Protection”).
9

10 XXXI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

12 57. This Decree will be lodged with the Court for a period of not less than 30 days for
13 public notice and comment. The Plaintiffs each reserve the right to withdraw or withhold their
14 consent if the comments regarding the Decree disclose facts or considerations that indicate this
15 Decree is inappropriate, improper, or inadequate. Each Defendant consents to the entry of this Decree
16 without further notice.
17

18 58. If for any reason this Court declines to approve this Decree in the form presented, this
19 agreement may be voided at the sole discretion of any Party, and the terms of the agreement may not
20 be used as evidence in any litigation between the Parties.

21 XXXII. SIGNATORIES/SERVICE

23 59. The Assistant Attorney General for the Environment and Natural Resources Division
24 of the United States Department of Justice and each undersigned representative of the State, the
25 Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and each Defendant certifies that he or she
26 is authorized to enter into the terms and conditions of this Decree and to execute and bind legally the
27
28

1 | Party that he or she represents to this document.

60. Each Defendant agrees not to oppose entry of this Decree by this Court or to challenge any provision of this Decree unless any Plaintiff has notified Defendants in writing that it no longer supports entry of the Decree.

61. Each Defendant will identify on the attached signature page the name and address of an agent who is authorized to accept service of process by mail on behalf of it with respect to all matters relating to this Decree. Each Defendant agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons.

XXXIII. FINAL JUDGMENT

62. Upon approval and entry of this Decree by the Court, this Decree will constitute the final judgment between and among the United States, the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, and each Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 18th DAY OF AUGUST, 2009

Robert G. Bryan

Robert J Bryan
United States District Judge

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, et al. v.
2 Occidental Chemical Corporation, et al.

3 FOR THE UNITED STATES OF AMERICA

4
5 Date: 4/8/09 _____ s/ _____
6

7 John C. Cruden
8 Assistant Attorney General
9 Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
10

11 FOR THE STATE OF WASHINGTON

12
13 Date: 01/20/09 _____ /S/ _____
14 Jay J. Manning
15 Director
Department of Ecology
16

17 Date : 11/26/08 _____ /S/ _____
18 Joan Marchioro
19 Assistant Attorney General
State of Washington
20

21 FOR THE PUYALLUP TRIBE OF INDIANS

22
23 Date: 02/09/09 _____ /S/ _____
24 Herman Dillon
25 Tribal Council Chair
26
27
28

1 FOR THE MUCKLESHOOT INDIAN TRIBE

2

3 Date: 01/09/09

4 _____/S/_____

5 Charlotte Williams
6 Tribal Council Chair

7 FOR OCCIDENTAL CHEMICAL CORPORATION

8

9 Date: 12/16/08

10 _____/S/_____

11 Michael G. Anderson
12 Vice President

13

14

15

16 Agent authorized to receive service of process by mail on behalf of Occidental Chemical
17 Corporation with respect to all matters relating to this Decree:

18 CT Corporation System
19 520 Pike Street
20 Seattle, WA 98101

1 FOR PIONEER AMERICAS, LLC

2

3 Date: 12/5/08

4 _____ /S/ _____

5 John McIntosh
6 President and CEO

7

8 Agent authorized to receive service of process by mail on behalf of Pioneer Americas, LLC with
9 respect to all matters relating to this Decree:

10 CT Corporation System
11 520 Pike Street
12 Seattle, WA 98101

13

14

15

16

17 FOR MARIANA PROPERTIES, INC.

18

19 Date: 12/16/08

20 _____ /S/ _____

21 Michael G. Anderson
President

22

23 Agent authorized to receive service of process by mail on behalf of Mariana Properties, Inc. with
24 respect to all matters relating to this Decree:

25 CT Corporation System
26 520 Pike Street
27 Seattle, WA 98101

28 CONSENT DECREE - Page 44

U.S. Department of Justice
NOAA GC - DOJ DARC
7600 Sand Point Way NE
Seattle, WA 98115-0070
(206) 526-6616

1 FOR DETREX CORPORATION

2

3 Date: 12/4/08

4 _____ /S/ _____

5 Robert M. Currie
6 Vice President, General Counsel & Secretary

7 Agent authorized to receive service of process by mail on behalf of Detrex Corporation with
8 respect to all matters relating to this Decree:

9 Mr. Robert M. Currie
10 Vice President, General Counsel & Secretary
11 Detrex Corporation
12 24901 Northwestern Highway, Suite 410
13 Southfield, MI 48075
14 (248) 358-5800 Ext. 110
15 (248) 799-7192 Fax
16 RCURRIE@DETREX-HQ.COM

17 FOR SOUND REFINING, INC.

18

19 Date: 12/2/08

20 _____ /S/ _____

21

22 Agent authorized to receive service of process by mail on behalf of Sound Refining with respect
23 to all matters relating to this Decree:

24 Bradley B. Jones
25 Gordon, Thomas, Honeywell, et al.
26 1201 Pacific Avenue, Suite 2200
27 P.O. Box 1157

1 Tacoma, WA 98401-1157
2
3
4
5
6 FOR SRI ACQUISITION CORPORATION
7
8 Date: 12/2/08 _____ /S/
9
10
11
12 Agent authorized to receive service of process by mail on behalf of SRI Acquisition Corporation
with respect to all matters relating to this Decree:
13
14 Bradley B. Jones
15 Gordon, Thomas, Honeywell, et al.
16 1201 Pacific Avenue, Suite 2200
17 P.O. Box 1157
18 Tacoma, WA 98401-1157
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