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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C97-5337 RJB

UNITED STATES OF AMERICA, ON)
BEHALF OF THE NATIONAL OCEANIC)
AND ATMOSPHERIC ADMINISTRATION)
AND THE UNITED STATES)
DEPARTMENT OF THE INTERIOR;)
STATE OF WASHINGTON THROUGH THE)
WASHINGTON DEPARTMENT OF)
ECOLOGY; PUYALLUP TRIBE OF)
INDIANS; AND MUCKLESHOOT INDIAN)
TRIBE,)
)
Plaintiffs,)
)
v.)
)
STATE OF WASHINGTON THROUGH THE)
WASHINGTON DEPARTMENT OF)
NATURAL RESOURCES,)
)
Defendant.)

CIVIL NO.
CONSENT DECREE

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

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1 I. INTRODUCTION

2 The United States of America ("United States"), on behalf of
3 the National Oceanic and Atmospheric Administration and the
4 United States Department of the Interior, the State of Washington
5 through the Washington Department of Ecology, the Puyallup Tribe
6 of Indians and the Muckleshoot Indian Tribe, (collectively
7 "Plaintiffs") have filed a complaint in this matter against the
8 State of Washington through the Washington Department of Natural
9 Resources ("WDNR") pursuant to Section 107 of the Comprehensive
10 Environmental Response, Compensation, and Liability Act of 1980
11 as amended ("CERCLA"), 42 U.S.C. § 9607 and the Model Toxics
12 Control Act ("MTCA"), RCW Ch. 70.105D. This Consent Decree
13 addresses claims of the Natural Resource Trustees (as defined
14 below in paragraph 3) for Natural Resource Damages (as defined in
15 paragraph 3) against WDNR arising from the State's ownership and
16 WDNR's management of state-owned aquatic lands in the
17 Commencement Bay Environment (as defined in paragraph 3).

18 II. RECITALS

19 A. The United States Department of Commerce, acting through
20 the National Oceanic and Atmospheric Administration, the United
21 States Department of the Interior, the Washington Department of
22 Ecology, the Puyallup Tribe of Indians, and the Muckleshoot
23 Indian Tribe have been designated pursuant to Section 107(f) of
24 CERCLA, 42 U.S.C. § 9607(f), and 40 C.F.R. Part 300, subpart G,
25 to serve as trustees for natural resources for the assessment and
26

27 Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

1 recovery of damages for injury to, destruction of, or loss of
2 natural resources under their trusteeship.

3 B. The State of Washington owns certain areas of aquatic
4 lands in the Commencement Bay Environment. WDNR, an
5 administrative agency of the State of Washington, is charged by
6 state law with primary responsibility for leasing, managing and
7 otherwise exercising the State of Washington's proprietary
8 interest in State-owned aquatic lands in the Commencement Bay
9 Environment.

10 C. State-owned aquatic lands in the Commencement Bay
11 Environment have become contaminated by releases over time of
12 various hazardous substances (as defined in Section 101 of
13 CERCLA, 42 U.S.C. § 9601).

14 D. The Plaintiffs have filed a complaint pursuant to CERCLA
15 Section 107, 42 U.S.C. § 9607, seeking recovery from WDNR of
16 damages for injuries to natural resources resulting from releases
17 of hazardous substances into the Commencement Bay Environment.
18 The Plaintiffs allege that the hazardous substances released by
19 third parties into the environment in and around the Commencement
20 Bay Environment have come to be deposited in, under and upon the
21 aquatic lands of the Commencement Bay Environment and that the
22 aquatic lands of the Commencement Bay Environment have
23 subsequently re-released and continue to re-release those
24 hazardous substances to the environment.

25 E. The Plaintiffs allege that hazardous substances
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1 released to the environment from State-owned aquatic lands have
2 injured and continue to injure natural resources under their
3 trusteeship, and that the public has suffered economic losses as
4 a consequence of those injuries.

5 F. The Plaintiffs allege that WDNR, acting on behalf of
6 the State as owner of aquatic lands in the Commencement Bay
7 Environment, is liable, pursuant to Section 107 of CERCLA, 42
8 U.S.C. § 9607, RCW 70.105D.040, and other laws, for the injuries
9 to natural resources resulting from releases of hazardous
10 substances from the aquatic lands and is liable for damages
11 arising from those injuries.

12 G. The Plaintiffs further allege that substantial
13 quantities of the hazardous substances contaminating State-owned
14 aquatic lands in the Commencement Bay Environment were initially
15 released to the environment by parties who are lessees of state-
16 owned aquatic lands or otherwise in contractual relationships
17 with WDNR. The Plaintiffs maintain that such contractual
18 relationships preclude WDNR from being able to take advantage of
19 third-party defenses under Section 107(b) of CERCLA, 42 U.S.C.
20 § 9607(b), and RCW 70.105D.040(3)(a)(iii).

21 H. WDNR alleges that it is not an "owner" of aquatic lands
22 as that term is defined in Section 101(20) of CERCLA, 42 U.S.C. §
23 9601(20), and RCW 70.105D.010(7), and is therefore exempt from
24 liability because the aquatic lands within the Commencement Bay
25 Environment were acquired by the State of Washington in its
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27

1 capacity as sovereign and because WDNR, acting on behalf of the
2 State of Washington, has neither caused nor contributed to
3 injuries to natural resources within the Commencement Bay
4 Environment.

5 I. WDNR alleges that hazardous substance releases into the
6 Commencement Bay Environment were caused solely by third parties
7 who were not in a contractual relationship with WDNR and that
8 WDNR is therefore not liable for those releases.

9 J. Without admission or adjudication of any fact or issue
10 of law, in settlement of this action WDNR has agreed to make
11 certain parcels of aquatic lands in the Commencement Bay
12 Environment available for habitat restoration, has agreed to
13 provide in-kind services for habitat restoration and enhancement
14 associated with those parcels, and has agreed to consult with the
15 Natural Resource Trustees on its management practices that could
16 affect the natural resources of the Commencement Bay Environment.

17 K. Without serving as consideration in this settlement,
18 WDNR has supported the settlement of the Natural Resource
19 Trustees' claims for Natural Resource Damages in the Commencement
20 Bay Environment in U.S., et al. v. Port of Tacoma, Civil No. 93-
21 5462 (W.D. Wash.) and U.S., et al. v. Simpson Tacoma Kraft Co.,
22 et al., Civil No. 91-5260(T)C (W.D. Wash.) by making state-owned
23 aquatic lands available for restoration sites. WDNR is currently
24 working with the City of Tacoma to make similar arrangements with
25 the Natural Resource Trustees for the use of state-owned aquatic
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1 lands as restoration sites in support of the planned settlement
2 of claims against the City for Natural Resource Damages in the
3 Commencement Bay Environment.

4 L. In addition to its aquatic lands management
5 responsibilities, WDNR is also responsible under state law for
6 managing certain upland areas and for administering state
7 regulations on the harvest of timber in areas that could affect
8 the marine resources of the Commencement Bay Environment and
9 those species dependent upon them. WDNR and the Natural Resource
10 Trustees agree that, in order to maximize the effectiveness of
11 efforts to restore injured Commencement Bay Environment natural
12 resources, WDNR should, consistent with other duties imposed by
13 law, exercise its management authority so as to minimize
14 detrimental impacts on Commencement Bay Environment natural
15 resources.

16 M. This Consent Decree only addresses claims by the
17 Plaintiffs against WDNR for damages arising from injuries to
18 natural resources resulting from releases of contaminants onto,
19 at and from State-owned aquatic lands in the Commencement Bay
20 Environment, including but not limited to the St. Paul Waterway.
21 This Consent Decree does not address WDNR's liability, if any, to
22 the United States on behalf of the Environmental Protection
23 Agency, to the Washington Department of Ecology, or to the
24 Puyallup Tribe of Indians, for any Removal, Remedial, or Response
25 Action (as those terms are defined in Section 101 of CERCLA, 42
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1 U.S.C. § 9601), or the costs thereof. Nor does this Consent
2 Decree address WDNR's liability, if any, to the Natural Resources
3 Trustees under CERCLA or other authority for Natural Resource
4 Damages resulting from WDNR's activities, including ownership or
5 management of lands, in areas outside of the Commencement Bay
6 Environment.

7 N. The Natural Resource Trustees completed a pre-assessment
8 screen in October of 1991. Preassessment Screen of Natural
9 Resource Damages in the Commencement Bay Environment Due to
10 Activities Taking Place In and About the Commencement Bay
11 Nearshore/Tideflats (CB/NT) Superfund Site, October 29, 1991.

12 The Trustees published a report on the results of Phase 1 of the
13 damage assessment process in June 1995. Scientific research
14 conducted on natural resources in Commencement Bay indicated that
15 many urban and industrial activities have resulted in releases of
16 hazardous substances that have contributed to the injury to
17 natural resources identified in these studies. Based on this
18 research, the Parties agree that, as to WDNR, no further natural
19 resource damage assessment is required to effectuate the purposes
20 of this Consent Decree. The Natural Resource Trustees have
21 concluded that they can determine with a reasonable degree of
22 certainty the level of damages appropriate to assign to WDNR.

23 O. WDNR denies each of the allegations of the complaint
24 filed by the United States and further denies responsibility for
25 the natural resource damages and any other costs or relief sought
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1 by the Trustees. The parties agree that actions undertaken by
2 WDNR in accordance with this Consent Decree do not constitute an
3 admission of any violation of treaty, federal, state, or common
4 law, or an admission of any liability by the WDNR to the United
5 States, the State of Washington, the Puyallup Tribe of Indians
6 and the Muckleshoot Indian Tribe. Nor shall this Consent Decree
7 be used as evidence or as collateral estoppel against any party
8 to this Decree in any action or proceeding other than an action
9 or proceeding to enforce the terms of this Consent Decree.

10 P. The parties recognize, and the Court in entering this
11 Consent Decree finds, that this Consent Decree has been
12 negotiated in good faith, that implementation of this Consent
13 Decree will expedite the cleanup of contaminated sediments and
14 the restoration of natural resources, avoid prolonged and
15 complicated litigation between the parties, and that this Consent
16 Decree is fair, reasonable, consistent with CERCLA, MTCA, and the
17 regulations promulgated thereunder, and in the public interest.

18 NOW, THEREFORE, before the taking of any testimony, before
19 the adjudication of the merits of this case, and without
20 admission of any law, fact, liability or responsibility by WDNR,
21 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

22 III. JURISDICTION AND VENUE

23 1. The Court has jurisdiction over the subject matter of
24 this action and the parties to this Consent Decree pursuant to 28
25 U.S.C. §§ 1331 and 1345, and Section 113(b) of CERCLA, 42 U.S.C.
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1 § 9613(b). This Court also has personal jurisdiction over WDNR
2 which, solely with respect to this Consent Decree, waives all
3 objections that it may have to jurisdiction of the Court or to
4 venue in this District and to service of process.

5 IV. APPLICABILITY OF CONSENT DECREE

6 2. The provisions of this Consent Decree shall apply to
7 and be binding on the parties to this Consent Decree, their
8 agents and successors. Changes in the organizational form or
9 status of a party shall have no effect on its obligations under
10 this Consent Decree.

11 V. DEFINITIONS

12 3. This Consent Decree incorporates by reference the
13 definitions set forth in Section 101 of CERCLA, 42 U.S.C. § 9601.
14 Terms specifically defined in this Consent Decree have the
15 meaning given to them by this Consent Decree. In addition,
16 whenever the following terms are used in this Consent Decree,
17 they shall have the following meanings:

18 a. "Commencement Bay Environment" means the waters of
19 Commencement Bay, Washington, including the shoreline, intertidal
20 areas and bottom sediments lying south of a line drawn from Point
21 Defiance to Dash Point, and including the Thea Foss Waterway, the
22 Wheeler-Osgood Waterway, the Middle Waterway, the St. Paul
23 Waterway, the Milwaukee Waterway, the Sitcum Waterway, the Blair
24 Waterway and the Hylebos Waterway. This area includes but is not
25 limited to the Commencement Bay Nearshore/Tideflats Superfund
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1 Site, as identified or amended by the U.S. EPA, and areas
2 affected by releases of hazardous substances within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4 b. "Covered Matters" means any civil or
5 administrative liability WDNR may have to the United States, the
6 Washington Department of Ecology, the Puyallup Tribe of Indians
7 and the Muckleshoot Indian Tribe, for any claim for Natural
8 Resource Damages based on releases of hazardous substances into
9 the Commencement Bay Environment prior to the effective date of
10 this Consent Decree. "Covered Matters" also includes WDNR's
11 obligations to Natural Resource Trustees which arise from the
12 Consent Decree entered in this Court under United States, et al.
13 v. Simpson-Tacoma Kraft Co., et al., Case No. 91-5260T. "Covered
14 Matters" shall not be construed to include any matter under the
15 authority of the United States, Washington Department of Ecology,
16 Puyallup Tribe of Indians or Muckleshoot Indian Tribe, if any,
17 that does not relate to recovery of Natural Resource Damages,
18 including the authority to issue orders requiring removal or
19 remedial action and actions to recover response costs associated
20 with such response actions pursuant to CERCLA, Tribal Law and the
21 Model Toxics Control Act, chapter 70.105D RCW, chapter 90.48 RCW,
22 and the authority to administer and enforce the State Sediment
23 Management Standards, chapter 173-204 WAC.

24 c. "Habitat Restoration Project" shall include
25 activities to restore, rehabilitate, replace or enhance natural
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1 resources and habitat functions. The primary purpose of such
2 projects shall be to benefit Commencement Bay and marine natural
3 resources and species dependent upon them that have been injured
4 by releases of hazardous substances.

5 d. "Natural Resource Damages" means any damages,
6 including all costs of damages assessment, for injury to,
7 destruction of, or loss of any and all Natural Resources
8 resulting in whole or in part from releases of hazardous
9 substances into the Commencement Bay Environment, recoverable by
10 the United States, the State of Washington, the Puyallup Tribe of
11 Indians, or the Muckleshoot Indian Tribe in their capacities as
12 Trustees on behalf of their respective publics under 42 U.S.C. §
13 9607, as amended, 33 U.S.C. § 1321, and chapter 70.105D RCW,
14 chapter 90.48 RCW, or any other federal, state, tribal, or common
15 law, except claims relating to treaties between the United States
16 and the Puyallup Tribe of Indians, and/or the Muckleshoot Indian
17 Tribe.

18 e. "Natural Resource Trustees" or "Trustees" means the
19 United States Department of Commerce, acting through the National
20 Oceanic and Atmospheric Administration, the United States
21 Department of the Interior, the Washington Department of Ecology
22 on behalf of the State of Washington, the Puyallup Tribe of
23 Indians, and the Muckleshoot Indian Tribe.

24 f. "Washington Department of Natural Resources" or
25 "WDNR" means the State of Washington as owner of state-owned
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1 aquatic lands as defined in RCW 79.90.010 as well as the
2 Commissioner of Public Lands and the Washington Department of
3 Natural Resources (including its predecessor agencies) as lessor,
4 manager and/or the entity otherwise exercising the State of
5 Washington's proprietary interest in such public lands.

6 VI. RESERVED PARCELS

7 4. a. WDNR and the Natural Resource Trustees have
8 identified three parcels of aquatic land in the Commencement Bay
9 Environment ("the Parcels") that will be subject to the terms of
10 this Consent Decree:

11 Parcel 1 consisting of those unplatted First Class Tidelands
12 lying westerly of, and in front of, Block 2, Replat of
13 Blocks 13 to 48, Tacoma Tidelands, formerly in King County,
dated 1918, on file at the office of the Commissioner of
Public Lands, in Olympia, Washington (also known as the
"Ashton Replat"), containing approximately 4.8 acres.

14 Parcel 2 consisting of those unplatted First Class Tidelands
15 located below the line of Mean Low Tide and lying in front
16 of the southeasterly 1/2 of Block 11, Tacoma Tidelands, as
Surveyed and Platted by The Board of Appraisers of Tide and
Shore Lands for King County, dated 1894-1895, and on file at
17 the office of the Commissioner of Public Lands in Olympia,
Washington, containing approximately 1.5 acres.

18 Parcel 3 consisting of that portion of the beds of navigable
19 waters of Commencement Bay located no less than 15 feet nor
20 more than 25 feet below Mean Lower Low Water, and lying in
21 front of Lot 7, Tacoma Tidelands, as Surveyed and Platted by
The Board of Appraisers of Tide and Shore Lands for King
County, dated 1894-1895, and on file at the office of the
22 Commissioner of Public Lands in Olympia, Washington,
containing approximately 2 acres.

23 b. Within sixty days following the effective date of
24 this Consent Decree, WDNR shall commence a survey of the Parcels
25 to accurately identify the Parcels that will be used for Habitat
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1 Restoration Projects as hereinafter described. WDNR shall
2 complete the survey and provide a written report of its results
3 to the Natural Resource Trustees within ninety days after
4 commencement of the survey.

5 c. Within one hundred fifty days following the
6 effective date of this Consent Decree, WDNR shall remove each of
7 the Parcels from its inventory of properties subject to lease
8 and/or take such other administrative action as will permanently
9 exempt each of the Parcels from lease or transfer.

10 d. WDNR agrees that the Natural Resource Trustees, in
11 consultation with WDNR, may construct, maintain and monitor one
12 or more Habitat Restoration Projects on each of the Parcels.

13 e. WDNR agrees that it will not lease, transfer ownership
14 or management of, or abandon jurisdiction over any of the
15 Parcels. WDNR further agrees that, without the prior written
16 approval of all the Natural Resource Trustees, it will not take
17 any action within the Commencement Bay Environment that would
18 significantly diminish the functionality of any Habitat
19 Restoration Project on any of the Parcels.

20 f. The Natural Resource Trustees agree to require that
21 any contractor who performs work for or on behalf of the Natural
22 Resource Trustees on any of the Parcels shall agree to indemnify
23 and save WDNR harmless against all claims of any nature,
24 including, but not limited to, claims by third parties for death,
25 personal injury, or property damage, and claims for environmental
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Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

1 liability that arise as the result of negligent acts or omissions
2 of such contractors, their employees and agents, while they are
3 present on any of the Parcels.

4 g. The parties expressly disclaim any intention to
5 effect a transfer to any of the Plaintiffs of any property
6 interest in the Parcels as a consequence of entering into this
7 Consent Decree or of any action taken under this Consent Decree.
8 To the extent permitted by law, WDNR shall hold the Natural
9 Resource Trustees harmless and shall indemnify and defend the
10 Natural Resource Trustees against any claim that may be asserted
11 by any person against the Natural Resource Trustees due to the
12 presence of Historic Contamination on, in, under or about the
13 Parcels except for claims arising from the sole or concurrent
14 negligence of any of the Natural Resource Trustees in connection
15 with hazardous substances on, in, under or about the Parcels.
16 If, irrespective of the Parties' intent, any property interest
17 is transferred to the Natural Resource Trustees by operation of
18 law pursuant to this Consent Decree, it is the Parties' intent
19 that such transfer shall not create liability for future cleanup,
20 remediation and/or Natural Resource Damages due to the presence
21 of Historic Contamination that remains on, in, under or about the
22 Parcels as of the date that such interest is deemed to have
23 transferred.

1 VII. ACCESS

2 5. Commencing upon the date of lodging of this Consent
3 Decree, WDNR agrees to provide the Trustees and their contractors
4 access at all reasonable times to the Parcels subject to the
5 terms of this Consent Decree and to any property to which access
6 is required for the oversight or implementation of this Consent
7 Decree. The Natural Resource Trustees shall give notice to WDNR
8 prior to access for purposes of sampling or performing
9 maintenance on any of the Parcels. Each Trustee shall have the
10 authority to enter freely and move about such property at all
11 reasonable times for the purposes of overseeing the requirements
12 of this Consent Decree, including, but not limited to:

- 13 a. Monitoring and assessing progress on the planning,
14 development, maintenance and monitoring of the
Habitat Restoration Projects;
- 15 b. Verifying any data or information submitted to the
16 Trustees;
- 17 c. Conducting such tests, investigations or sample
18 collections as deemed necessary to monitor
19 compliance with this Consent Decree or to assist
20 in further identifying and quantifying natural
21 resource injuries requiring restoration actions
22 and in planning and carrying out further
restoration actions;
- 23 d. Using a camera, sound recording device or other
type equipment to record the work done under this
Consent Decree or injury to natural resources; and
- 24 e. Undertaking any maintenance action the Trustees
determine necessary.

25 6. WDNR shall have the right to accompany any Trustee or
26 its representative on the property. Anyone provided access

27 Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
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(202) 514-3143

1 through this Consent Decree shall comply with applicable health
2 and safety requirements and shall not interfere, to the extent
3 practicable, WDNR authorized activities.

4 VIII. IN-KIND SERVICES

5 7. a. WDNR agrees that it will participate in the
6 selection, planning, design, implementation, monitoring and
7 management of each Habitat Restoration Project the Natural
8 Resource Trustees and WDNR may elect to create on any of the
9 Parcels. As the Natural Resource Trustees are undertaking
10 activities with regard to the Habitat Resource Projects and
11 identify services that WDNR may be able to provide, the Natural
12 Resource Trustees will request that WDNR provide such services,
13 and WDNR agrees to discuss the Trustees' request for services
14 with the Trustees. WDNR's participation may include, after
15 consultation with the Natural Resource Trustees, the providing of
16 scientific consultation, project management services, cadastral
17 surveying, photogrammetry, underwater investigations and
18 inventories, and geographic information system services. Such
19 participation shall include the active involvement of WDNR staff
20 in such activities. WDNR shall not be obliged to contract with
21 outside consultants, or to purchase or lease specific equipment,
22 supplies or materials in satisfaction of its obligations under
23 this subparagraph.

24 b. WDNR shall not seek reimbursement of its costs
25 incurred under subparagraph a. from any Natural Resource Damages
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1 collected by the Plaintiffs from third parties.

2 c. It is understood and agreed that WDNR, and its
3 agents, officers, employees and contractors, in the performance
4 of any of the work or services provided under this Consent Decree
5 as in-kind contributions, shall act as independent contractors
6 and not as agents or employees of any other party to this Consent
7 Decree.

8 d. All in-kind services provided by WDNR under this
9 Consent Decree shall be subject to oversight by the Trustees.
10 WDNR may assert business confidentiality claims covering part or
11 all of the documents or information submitted to Plaintiffs under
12 this Consent Decree to the extent permitted by and in accordance
13 with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 15
14 C.F.R. § 4.7. Documents or information determined to be
15 confidential by the United States will be afforded the protection
16 specified in 15 C.F.R. Part 4. If no claim of confidentiality
17 accompanies documents or information when they are submitted to
18 the Plaintiffs, or if the United States has notified WDNR that
19 the documents or information are not confidential under the
20 standards of Section 104(e)(7) of CERCLA and 15 C.F.R. § 4.7, the
21 public may be given access to such documents or information
22 without further notice to WDNR.

23 e. WDNR has committed approximately 1.5 full time
24 equivalent employees per year to participation in Natural
25 Resource Trustee activities in the Commencement Bay Environment
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1 for the 1995-1997 State fiscal biennium. WDNR expects the
2 Legislature to appropriate sufficient funds to allow continuation
3 of this level of participation into the next state fiscal
4 biennium and to make appropriate additional services, as noted in
5 paragraph 7 and in recital K, available on a project-by-project
6 basis for restoration activities on the Parcels and within the
7 Commencement Bay Environment.

8 IX. NATURAL RESOURCE IMPACTS CONSULTATION

9 8. WDNR agrees, upon request of the Natural Resource
10 Trustees, to consult with the Natural Resource Trustees regarding
11 material impacts or potential material impacts that its actions,
12 planned actions or failure to act may have upon Commencement Bay
13 Environment marine resources. Natural Resource Trustees may
14 provide all data and analyses which tend to indicate impacts, or
15 lack thereof, on the Parcels. WDNR agrees that it will work with
16 the Natural Resource Trustees in good faith to identify promptly
17 the impacts on Commencement Bay Environment marine resources
18 caused or potentially caused by WDNR's actions or inaction, and
19 to identify in a timely manner corrective measures needed to
20 prevent or alleviate detrimental impacts. The obligations under
21 this paragraph shall only extend to December 31, 2045.

22 X. COVENANTS NOT TO SUE

23 9. a. In consideration of the actions that will be
24 performed by WDNR in lieu of and equivalent to damages under the
25 terms of this Consent Decree, and except as specifically provided
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1 in paragraphs 10, 11, and 12, the United States, the Washington
2 Department of Ecology, the Puyallup Tribe of Indians and the
3 Muckleshoot Indian Tribe covenant not to sue or to take any other
4 civil or administrative action against the WDNR for Covered
5 Matters.

6 b. Except as specifically provided in paragraph 15,
7 WDNR hereby covenants not to sue or to take any other civil or
8 administrative action against the United States, the Washington
9 Department of Ecology, the Puyallup Tribe of Indians and the
10 Muckleshoot Indian Tribe for any claims relating to or arising
11 from the Covered Matters or the filing of the complaint herein.

12 c. These covenants not to sue and the following
13 reservation of rights shall take effect upon entry of this
14 Consent Decree by the Court, subject to the parties' rights to
15 void the Consent Decree pursuant to paragraph 21.b. if the Court
16 declines to approve the Consent Decree as presented. These
17 covenants not to sue remain in effect so long as WDNR and the
18 Natural Resource Trustees are fulfilling or have fulfilled their
19 obligations under this Consent Decree.

20 XI. RESERVATION OF RIGHTS

21 10. WDNR shall remain liable to the extent that it is
22 liable under existing law, or as it may be amended, for the
23 removal and/or remediation of any hazardous substances or for
24 response costs associated therewith, including all known or
25 subsequently discovered hazardous substances, that remain on, in,
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1 under or about the Parcels as of the effective date of the
2 Consent Decree ("Historical Contamination"). WDNR shall remain
3 liable, to the extent noted in the preceding sentence, for all
4 monitoring, testing or other ongoing or future requirements
5 regarding cleanup or remediation of Historic Contamination on,
6 in, under or about the Parcels that either have been, or may in
7 the future be, imposed by any lawful means.

8 11. The covenants not to sue set forth in Paragraph 9 a.
9 and b. above pertain only to Covered Matters. Notwithstanding
10 any other provision of this Consent Decree, the Plaintiffs
11 reserve, and this Consent Decree is without prejudice to, all
12 rights against WDNR with respect to all other matters, including
13 but not limited to the following:

14 a. Claims under applicable law seeking to compel WDNR
15 to perform removal or remedial activities, or seeking to recover
16 the costs of removal or remedial activities including any
17 enforcement activities related thereto;

18 b. Claims arising from the past, present or future
19 disposal, release or threat of a release of hazardous substances
20 in areas other than the Commencement Bay Environment;

21 c. Claims for recovery of Natural Resource Damages in
22 the Commencement Bay Environment based on conditions resulting
23 from a release of hazardous substances after the effective date
24 of this Consent Decree and that are actionable under treaty,
25 federal, state or tribal law;

1 d. Non-monetary claims based on a failure by WDNR to
2 satisfy requirements of this Consent Decree;

3 e. Claims for criminal liability;

4 f. Claims for Natural Resource Damages if conditions,
5 information, or factors in the Commencement Bay Environment not
6 known to the Trustees at the time of entry of this Consent Decree
7 are discovered that, together with any other relevant
8 information, indicates (1) that there is injury or threat of
9 injury to, destruction of, or loss of natural resources of a type
10 unknown, or of a magnitude greater than was known, at the time of
11 the entry of this Consent Decree; or (2) that WDNR is responsible
12 for releases of hazardous substances to the Commencement Bay
13 Environment other than solely as a consequence of its
14 ownership/management of State-owned aquatic lands, and that those
15 releases have resulted in injury to, destruction of, or loss of
16 natural resources;

17 g. Liability for violations of applicable federal,
18 state or tribal laws or regulations (other than Covered Matters)
19 by WDNR in complying with and implementing this Consent Decree;
20 and

21 12. Notwithstanding any other provision of this Consent
22 Decree, the Plaintiffs reserve, and this Consent Decree is
23 without prejudice to, liability of the State of Washington by or
24 through a state agency other than WDNR.

25 13. The United States' consent to this Consent Decree and
26

1 participation in this settlement is solely on its own behalf and
2 not as a trustee for any Indian Tribe.

3 14. The United States, the Puyallup Tribe of Indians and
4 the Muckleshoot Indian Tribe covenant not to seek double recovery
5 of Natural Resource Damages from WDNR for injuries within the
6 Commencement Bay Environment for Covered Matters by bringing
7 claims pursuant to Treaties between the United States and the
8 Puyallup Tribe of Indians and/or the Muckleshoot Indian Tribe.

9 15. Notwithstanding any other provision of this Consent
10 Decree, WDNR reserves the right to institute proceedings against
11 the United States, the Washington Department of Ecology, the
12 Puyallup Tribe of Indians and the Muckleshoot Indian Tribe for
13 the claims based on a failure by the United States, the
14 Washington Department of Ecology, the Puyallup Tribe of Indians
15 and the Muckleshoot Indian Tribe to fulfill their obligations
16 under this Consent Decree. WDNR's reservations of rights
17 pursuant to this subparagraph do not include claims against the
18 Natural Resource Trustees for monetary relief. Nothing in this
19 paragraph is intended to constitute a waiver of any sovereign
20 immunity defense that may be available to any of the Natural
21 Resource Trustees.

22 XII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

23 16. a. Nothing in this Consent Decree shall be construed
24 to create any rights in, or grant any cause of action to, any
25 person not a party to this Consent Decree. Each of the Parties
26

1 expressly reserves any and all rights (including, but not limited
2 to, any right to contribution), defenses, claims, demands, and
3 causes of action which each Party may have with respect to any
4 matter, transaction, or occurrence relating in any way to the
5 Commencement Bay Environment against any person not a party
6 hereto.

7 b. The United States, the Washington Department of
8 Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian
9 Tribe acknowledge and agree that fulfillment of the commitments
10 made by WDNR pursuant to this Consent Decree represents a good
11 faith settlement and compromise of disputed claims and that the
12 settlement represents a fair, reasonable and equitable discharge
13 of WDNR's liability for Covered Matters. WDNR shall have the
14 benefits of Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), RCW
15 70.105D.040(4)(d), RCW 4.22.060(2), and any other applicable
16 statute or other law limiting or extinguishing its contribution
17 liability to persons not a party to this Consent Decree for
18 Covered Matters and affording WDNR rights of contribution or
19 other rights to recover from such persons for costs or damages.

20 c. The United States, the Washington Department of
21 Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian
22 Tribe certify that timely fulfillment of the commitments made by
23 WDNR pursuant to this Consent Decree will be appropriate actions
24 necessary to protect and restore the natural resources allegedly
25 injured by the releases of hazardous substances in the

1 Commencement Bay Environment for which WDNR may be liable and
2 that fulfillment of those commitments satisfies the requirements
3 of Section 122(j)(2) of CERCLA, 42 U.S.C. § 9622(j)(2).

4 d. Other than with regard to Covered Matters, in any
5 subsequent administrative or judicial proceeding initiated by the
6 Plaintiffs for injunctive relief, recovery of response costs, or
7 other appropriate relief, WDNR shall not assert, and may not
8 maintain, any defense or claim based upon the principles of
9 waiver, res judicata, collateral estoppel, issue preclusion,
10 claim-splitting, or other defenses based upon any contention that
11 the claims raised by the Plaintiffs in the subsequent proceeding
12 were or should have been brought in the instant case. However,
13 nothing in this Paragraph affects the enforceability of the
14 covenants not to sue set forth in Paragraph 9 a. and b.

15 XIII. RETENTION OF JURISDICTION/DISPUTE RESOLUTION

16 17. a. The Court retains jurisdiction over both the
17 subject matter of this Consent Decree and the Parties for
18 purposes of entering such further orders, direction, or relief as
19 may be appropriate for the construction, implementation,
20 enforcement or modification of this Consent Decree, or to resolve
21 disputes in accordance with this paragraph.

22 b. In the event a dispute should arise between WDNR
23 and the Natural Resource Trustees regarding the interpretation or
24 implementation of the terms of this Consent Decree, the parties
25 shall make all good faith efforts to resolve the dispute prior to
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1 | invoking the continuing jurisdiction of the Court. Prior to
2 | invoking the Court's jurisdiction to resolve a dispute a Party
3 | shall deliver to each of the other parties a written statement
4 | detailing the matters in dispute and proposing terms to resolve
5 | the dispute. Except where the party seeking to invoke the
6 | Court's jurisdiction can demonstrate a compelling need for a more
7 | prompt resolution, such statement of the dispute must be
8 | delivered to each of the other parties at least sixty days prior
9 | to filing any motion or application for relief from the Court.

10 | c. In resolving disputed matters presented to it, the
11 | Court shall be guided by the terms and purposes of this Consent
12 | Decree, the legal restraints placed on the parties, and the
13 | parties' mutual goal of attempting to benefit those Commencement
14 | Bay Environment marine natural resources and species dependent
15 | upon them that have been injured by releases of hazardous
16 | substances.

17 | XIV. NOTICES AND SUBMISSIONS

18 | 18. Whenever, under the terms of this Consent Decree,
19 | written notice is required to be given or a document is required
20 | to be sent by one party to another, it shall be directed to the
21 | individuals at the addresses specified below, unless those
22 | individuals or their successors give notice of a change to the
23 | other parties in writing. All notices and submissions shall be
24 | considered effective upon receipt, unless otherwise provided.

1 As to the United States:

2 Chief, Environmental Enforcement Section
3 Environment and Natural Resources Division
4 U.S. Department of Justice
5 P.O. Box 7611
6 Ben Franklin Station
7 Washington, D.C. 20044
8 Re: DJ# 90-11-2-1049B

9 As to the National Oceanic and Atmospheric Administration:

10 Chief, Damage Assessment Center
11 NOAA/N/ORCAx1
12 Room 10218
13 1305 East West Highway
14 Silver Spring, MD 20910

15 Robert A. Taylor
16 NOAA GC Natural Resources NW
17 7600 Sand Point Way, N.E.
18 Seattle, Washington 98115-0070

19 As to the Department of the Interior:

20 Director, Olympia Field Office
21 U.S. Fish and Wildlife Service
22 3704 Griffin Lane S.E., Suite 102
23 Olympia, WA 98501-2192

24 As to the Washington Department of Ecology:

25 Toxics Cleanup Program
26 State of Washington
27 Department of Ecology
28 P.O. Box 47600
Olympia, WA 98504-7600

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

1 As to the Puyallup Tribe of Indians:

2 Director
3 Environmental Protection Department
4 Puyallup Tribe of Indians
5 2002 East 28th Street
6 Tacoma, WA 98404

7 Michael P. O'Connell
8 Stoel Rives LLP
9 600 University Street, Suite 3600
10 Seattle, Washington 98101

11 As to the Muckleshoot Indian Tribe:

12 Chair
13 Muckleshoot Indian Tribe
14 39015 172nd Avenue SE
15 Auburn, WA 98092

16 and

17 Office of the Tribal Attorney
18 Muckleshoot Indian Tribe
19 39015 172nd Avenue SE
20 Auburn, WA 98092

21 As to WDNR:

22 Division Manager
23 Aquatic Resources Division
24 Department of Natural Resources
25 P.O. Box 47001
26 Olympia, WA 98504-7001

27 XV. GENERAL PROVISIONS

28 19. a. The Complaint states claims upon which relief may
be granted.

b. If for any reason the Court should decline to
approve this Consent Decree in the form presented, any statements
made in negotiation and the terms herein may not be used as
evidence in any litigation or administrative proceeding.

c. This Consent Decree shall not be construed in any

1 way to relieve the parties to this Consent Decree or any other
2 person or entity from the obligation to comply with any federal,
3 state, Tribal, or local law.

4 d. This Consent Decree does not relieve or otherwise
5 satisfy any obligation or liability of any person or entity not a
6 party to this Consent Decree. Each of the parties expressly
7 reserves any and all rights (including the right to contribution
8 protection), defenses, claims, demands and causes of action that
9 each party may have with respect to any matter, transaction or
10 occurrence relating in any way to the Commencement Bay
11 Environment against any person not a party hereto.

12 e. Nothing in this Consent Decree shall be construed
13 to require any governmental entity to spend state or federal
14 funds not appropriated for or allocated to obligations identified
15 under this Consent Decree.

16 f. The Consent Decree may be executed in any number of
17 counterparts, and each executed counterpart shall have the same
18 force and effect as an original instrument.

19 g. This Consent Decree is not, and shall not be
20 construed to be, a permit issued pursuant to any federal or state
21 statute or regulation.

22 XVI. MODIFICATION

23 20. The terms of this Consent Decree may be modified only
24 by a subsequent written agreement by the U.S. Department of
25 Justice, the Natural Resource Trustees, and WDNR and approval by
26

1 the Court as a modification to this Consent Decree.

2 XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

3 21. a. This Consent Decree shall be lodged with the Court
4 for a period of not less than thirty (30) days for public notice
5 and comment consistent with the procedures in Section 122(d)(2)
6 of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The
7 United States reserves the right to withdraw or withhold its
8 consent if the comments regarding the Consent Decree disclose
9 facts or considerations which indicate that the Consent Decree is
10 inappropriate, improper, or inadequate.

11 b. If for any reason the Court should decline to
12 approve this Consent Decree in the form presented, this agreement
13 is voidable at the sole discretion of any party and the terms of
14 the agreement may not be used as evidence in any litigation
15 between the parties.

16 XVIII. EFFECTIVE DATE

17 22. The effective date of this Consent Decree shall be the
18 date upon which this Consent Decree is entered by the Court.

19 XIX. SIGNATORIES/SERVICE

20 23. a. The undersigned representative of WDNR, the
21 Assistant Attorney General for the Environment and Natural
22 Resources Division of the Department of Justice on behalf of the
23 Federal Trustees, and the undersigned representative for each of
24 the other Plaintiffs certifies that he or she is fully authorized
25 to enter into the terms and conditions of this Consent Decree and
26

27 Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

1 | to execute and legally bind such party to this document.

2 | b. WDNR shall identify, on the attached signature
3 | page, the name, address and telephone number of an agent who is
4 | authorized to accept service of process by mail on behalf of WDNR
5 | with respect to all matters arising under or relating to this
6 | Consent Decree. WDNR hereby agrees to accept service in that
7 | manner.

8 | SO ORDERED THIS _____ DAY OF _____, 1996.
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11 | _____
12 | UNITED STATES DISTRICT JUDGE
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States, et al. v. State of Washington through
3 the Washington Department of Natural Resources relating to the
4 Commencement Bay Environment.

5 FOR THE UNITED STATES OF AMERICA

6 Dated: 4/27/97 *L. J. Schiffer*
7 LOIS J. SCHIFFER
8 Assistant Attorney General
9 Environmental Enforcement Section
10 Environment & Nat. Res. Division
11 U.S. Department of Justice
12 Washington, D.C. 20530

13 Dated: April 4, 1997 *Thomas W. Swegle*
14 THOMAS W. SWEGLE
15 Trial Attorney
16 Environmental Enforcement Section
17 U.S. Department of Justice
18 P.O. Box 7611
19 Washington, D.C. 20044
20 (202) 514-3143

21 OF COUNSEL:
22 Robert Taylor, Esquire
23 National Oceanic and Atmospheric
24 Administration
25 GC Natural Resources NW
26 7600 Sand Point Way, N.E.
27 Seattle, Washington 98115-0070
28 Barry Stein, Esquire
Department of the Interior
Office of the Solicitor
Pacific Northwest Region
500 N.E. Multnomah Street
Suite 607
Portland, OR 97232

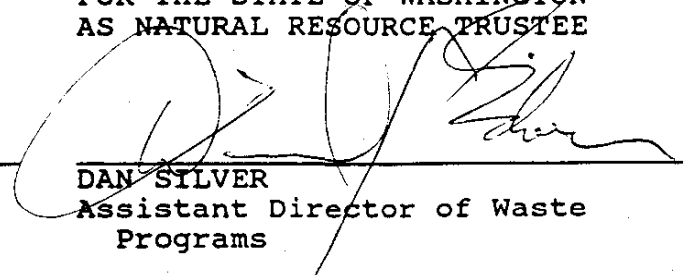
Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
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Washington, DC 20044
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FOR THE STATE OF WASHINGTON
AS NATURAL RESOURCE TRUSTEE

Dated:

12/23/96



DAN SILVER
Assistant Director of Waste
Programs

Dated:

1/3/97

Mary McCre
MARY McCREA
Assistant Attorney General

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PUYALLUP TRIBE OF INDIANS

Dated: 1/22/97

Bill Sterud
~~CARL WILLIAM STERUD~~, Chairman

MUCKLESHOOT INDIAN TRIBE

Dated:

1/14/97

Virginia Cross
VIRGINIA CROSS, Chairperson

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FOR THE STATE OF WASHINGTON
THROUGH THE WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Dated: 1/24/97

Kaleen Cottingham
KALEEN COTTINGHAM
Supervisor

For matters arising under or relating to the Consent Decree, service may be made on the Natural Resources Division, Office of the Attorney General, State of Washington, P.O. Box 40100, Olympia, Washington, 98504, and on the Division Manager, Aquatic Resources Division, Washington State Department of Natural Resources, P.O. Box 47001, Olympia, WA 98504-7001.