

**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

PORT OF TACOMA, a municipal
corporation,

Defendant.

NO. _____

CONSENT DECREE

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1 **I. INTRODUCTION**

2 1. The mutual objective of the State of Washington, Department of Ecology
3 (Ecology) and the Port of Tacoma (Defendant) under this Decree is to provide for remedial action
4 at a facility where there has been a release or threatened release of hazardous substances. The
5 Site is generally depicted in Exhibit A, attached herein. This Decree requires Defendant to
6 implement the preferred alternative from Ecology’s Cleanup Action Plan (CAP) and implement
7 the institutional controls identified in the CAP, including an environmental covenant (EC). The
8 CAP is attached herein as Exhibit B.

9 2. Ecology has determined that these actions are necessary to protect human health
10 and the environment.

11 3. The Complaint in this action is being filed simultaneously with this Decree. An
12 Answer has not been filed, and there has not been a trial on any issue of fact or law in this case.
13 However, the Parties wish to resolve the issues raised by Ecology’s Complaint. In addition, the
14 Parties agree that settlement of these matters without litigation is reasonable and in the public
15 interest, and that entry of this Decree is the most appropriate means of resolving these matters.

16 4. By signing this Decree, the Parties agree to its entry and agree to be bound by its
17 terms.

18 5. By entering into this Decree, the Parties do not intend to discharge non-settling
19 parties from any liability they may have with respect to matters alleged in the Complaint. The
20 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
21 sums expended under this Decree.

22 6. This Decree shall not be construed as proof of liability or responsibility for any
23 releases of hazardous substances or cost for remedial action nor an admission of any facts;
24 provided, however, that Defendant shall not challenge the authority of the Attorney General and
25 Ecology to enforce this Decree.
26

1 she is fully authorized to enter into this Decree and to execute and legally bind such party to
2 comply with this Decree. Defendant agrees to undertake all actions required by the terms and
3 conditions of this Decree. No change in ownership or corporate status shall alter Defendant's
4 responsibility under this Decree. Defendant shall provide a copy of this Decree to all agents,
5 contractors, and subcontractors retained to perform work required by this Decree, and shall
6 ensure that all work undertaken by such agents, contractors, and subcontractors complies with
7 this Decree.

8 IV. DEFINITIONS

9 1. Unless otherwise specified herein, all definitions in RCW 70.105D.020,
10 WAC 173-204 and WAC 173-340 shall control the meanings of the terms in this Decree.

11 A. Site: The Site is referred to as Port of Tacoma – Earley Business Center,
12 FSID: 9762715, CSID: 2395. The Site constitutes a facility under RCW 70.105D.020(8).
13 The Site is defined by where a hazardous substance, other than a consumer product in
14 consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to
15 be located.

16 B. Consent Decree or Decree: Refers to this Consent Decree and each of the
17 exhibits to this Decree. All exhibits are integral and enforceable parts of this Consent
18 Decree.

19 C. Defendant: Refers to the Port of Tacoma.

20 D. Parties: Refers to the State of Washington, Department of Ecology and
21 Defendant.

22 E. Port: Refers to the Port of Tacoma.

23 F. Earley Business Center: Refers to the property and various separate
24 subareas generally located at 401 Alexander, Tacoma, WA and owned by the Port of
25 Tacoma.

1 G. Subareas: The State has determined that various areas should be combined
2 based on the early investigation and characterization of the Site. These areas are further
3 described in Section 2.4 (Nature and Extent of Contamination) of the CAP, Exhibit B.
4 These areas are as follows: Southwest Debris Layer (SWD), Blair Shoreline Soil and
5 Groundwater, Historical Underground Storage Tanks, Pier 23 Soil and Groundwater, the
6 Zinc Hotspot, Sandblast Grit, Former AK-WA Giannotti Shipyard, EP-113, and Building
7 595.

8 H. Target Areas: Areas of contamination that overlap with the Subareas and are
9 based on similar COCs or remedies. The Target Areas are described in Section 3.7 of
10 the CAP (Exhibit B). The Parties determined the classification of these Target Areas
11 was necessary to evaluate the cleanup alternatives and the final alternative for the Site.

12 V. FINDINGS OF FACT

13 1. Ecology makes the following findings of fact without any express or implied
14 admissions of such facts by Defendant.

15 A. Based upon factors currently known to Ecology, the Site is generally
16 located at 401 Alexander Avenue, as shown in the Site Location Diagram (Exhibit A);
17 centroid = -122.409448° W x 47.280221° N; S27, T21N, R3E. The Site consists of
18 approximately 50 upland acres and 30 acres that are intertidal and subtidal land in
19 Commencement Bay, lying between Hylebos and Blair Waterways.

20 B. According to Pierce County Assessor's records, the Port of Tacoma is the
21 sole owner of the properties encompassed by the area depicted in Exhibit A of this
22 document, and further described in the CAP.

23 C. The majority of the Site is paved or covered by buildings. Some
24 uncovered ground is extant along the northwest and southwest shorelines of the Site.

25 D. During World War (WW) I, the area was used as a shipyard and sawmill.
26 During WW II, shipbuilding recommenced to support the war effort. Ships were

1 constructed on intertidal shipways and support work performed on the uplands. After
2 the war, until approximately 1960, some of the upland facilities were used to repair,
3 dismantle, and salvage ships.

4 E. The Port purchased the Site from the U.S. Navy in 1960. Various areas
5 of the facility have been leased to tenants for commercial and industrial purposes since
6 that time. Known uses have included freight hauling and distribution; furniture
7 manufacturing; fishing fleet outfitting; drilling support services; lumber milling, and
8 vessel mooring, maintenance, decommissioning, and construction. Additional details
9 regarding facility uses are included in the CAP.

10 F. In addition to the EBC subareas, contamination migrating from releases
11 at neighboring properties is a factor in determining alternatives and developing the CAP
12 for the Site. These are described as follows –

13 **Occidental Chemical Corporation** – Between 1929 and 2002, OCC and its
14 predecessor, Hooker Chemical, operated a chemical manufacturing plant on land
15 adjacent to the Site. Operations included a chlor-alkali plant (1929-2002) and a
16 trichloroethylene/tetrachloroethylene (TCE/PCE) manufacturing facility (1947-1973).
17 Contamination from those activities extends onto the Site (primarily chlorinated organic
18 chemicals, but also some alkaline conditions, PCBs, pesticides, and metals; CRA 2008).
19 OCC-related contamination on the Site is primarily associated with transport of volatile
20 organic compounds (VOCs), with the highest contaminant concentrations found in deep
21 groundwater. Lateral migration of contaminant plumes in the mid-range water bearing
22 zones (from approximately 50 to 75 ft. below ground surface [bgs]) within the Site is
23 currently being controlled, at least in part, by a groundwater extraction and treatment
24 system that OCC has operated since 1996. Releases from the OCC Site are not regulated
25 under this Decree and are not subject to any covenants, protections, or requirements of
26

1 this Decree. The OCC Site is being remediated under a separate administrative document
2 pursuant to RCW 70.105D.

3 **Commencement Bay** – The Site falls within the broader footprint of the
4 Commencement Bay Superfund Site (Superfund Site) (Ecology 2015). The Superfund
5 cleanup process began in 1980 with identification of sediment contamination during
6 Ecology sampling activities. The Superfund Site was listed on the National Priorities List
7 in 1983, followed by completion of a Remedial Investigation in 1984, Feasibility Study
8 in 1988, and Record of Decision in 1989, which initiated the major phase of source
9 control efforts. The Superfund Site continues to be remediated pursuant to the 1989 ROD.
10 Source control efforts included upland source control actions, as well as sediment
11 remediation of the Middle, Hylebos, and Thea Foss Waterways. The ROD expressly gave
12 the State responsibility for administering source control activities for upland areas in
13 Commencement Bay.

14 G. As described in the RI and the CAP, several previous cleanup actions
15 have been performed independently, without Ecology oversight or assistance, at various
16 locations on the EBC Site. Most of these have been in connection with petroleum
17 hydrocarbon contamination associated with underground storage tanks. In some cases,
18 tanks were removed and some remediation of contaminated soils performed. In other
19 cases, tanks were removed, but soil contamination was not addressed. In other cases,
20 tank locations were identified, but no remedial actions were taken. Previous
21 investigations have also identified areas that have been contaminated with waste
22 materials associated with ship building and ship dismantling activities.

23 H. Ecology and the Port executed an Agreed Order No. DE 9553 (Order),
24 dated April 2, 2013, which required the Port to conduct remedial actions at the Site and
25 prepare and submit certain deliverables to Ecology. The actions required pursuant to this
26

1 Order have been completed and the Port has satisfied all its obligations pursuant to the
2 Order.

3 I. In September 2013, the Port provided Ecology with a Previous
4 Investigations Results Report, documenting the various independent remedial
5 investigations and remedial actions that had been performed at the EBC Site. Following
6 Ecology approval of Remedial Action and Feasibility Study Work Plans, a Public Review
7 Draft of the Remedial Action/Feasibility Study Report (RI/FS), dated March 11, 2016.

8 J. Releases and/or potential releases of hazardous substances occurred at
9 the Site. The following hazardous substances at the Site have been detected at
10 concentrations above MTCA cleanup levels: petroleum hydrocarbons; heavy metals;
11 polynuclear aromatic hydrocarbons (PAHs); and polychlorinated biphenyls (PCBs) in
12 soils, groundwater, and sediments. These contaminants and their locations are described
13 in detail in Section 2.4 of the attached Cleanup Action Plan.

14 K. As documented in the Cleanup Action Plan (CAP) (Exhibit B), Ecology
15 has chosen a final cleanup action alternative to be implemented at the Site.

16 VI. WORK TO BE PERFORMED

17 1. This Decree contains a program designed to protect human health and the
18 environment from the known release, or threatened release, of hazardous substances or
19 contaminants at, on, or from the Site. All remedial action(s) conducted by Defendant at the Site
20 shall be done in accordance with WAC 173-340 and WAC 173-204.

21 2. The Defendant shall implement the CAP (Exhibit B) in accordance with the
22 Scope of Work and Schedule attached to this Decree (Exhibit C). Among other remedial actions,
23 the CAP requires Defendant to:

- 24 • Prepare an Engineering Design Report(s) (EDR), Compliance Monitoring
25 Plans(s), and Construction Plans and Specifications (collectively, Plans) that
26

1 describe the methods by which the remedial actions required by the CAP will be
2 implemented.

- 3 • Perform compliance monitoring, as required in the CAP and Plans, in accordance
4 with WAC 173-340-410.
- 5 • Prepare and record, as appropriate, any necessary Environmental (Restrictive)
6 Covenant(s) in accordance with Section VI.7. of this Decree.

7 3. All plans or other deliverables submitted by Defendant for Ecology's review and
8 approval under the CAP (Exhibit B) or Scope of Work and Schedule (Exhibit C) shall, upon
9 Ecology's approval, become integral and enforceable parts of this Decree.

10 4. If Defendant learns of a significant change in conditions at the Site, including but
11 not limited to a statistically significant increase in contaminant and/or chemical concentrations
12 in media (e.g., soil, groundwater, surface water, air, and/or sediments), Defendant, shall notify
13 Ecology in writing within seven (7) days of receiving any supporting reports or records
14 (including validated laboratory analyses) relating to the change in conditions.

15 5. Pursuant to WAC 173-340-440(11), Defendant shall maintain sufficient and
16 adequate financial assurance mechanisms to cover all costs associated with the operation and
17 maintenance of the remedial action at the Site, including institutional controls, compliance
18 monitoring, and corrective measures.

19 A. Within sixty (60) days of the effective date of this Decree, Defendant shall
20 submit to Ecology for review and approval an estimate of the costs associated with the
21 operation and maintenance of the remedial action at the Site that it will incur in carrying
22 out the terms of this Decree. Within sixty (60) days after Ecology approves the
23 aforementioned cost estimate, Defendant shall provide proof of financial assurances
24 sufficient to cover those costs in a form acceptable to Ecology.

25 B. Defendant shall adjust the financial assurance coverage and provide
26 Ecology's project coordinator with documentation of the updated financial assurance for:

1 i. Inflation, annually, within thirty (30) days of the anniversary date
2 of the entry of this Decree; or if applicable, the modified anniversary date
3 established in accordance with this section, or if applicable, ninety (90) days after
4 the close of Defendant's fiscal year if the financial test or corporate guarantee is
5 used.

6 ii. Changes in cost estimates, within thirty (30) days of issuance of
7 Ecology's approval of a modification or revision to the CAP that result in
8 increases to the cost or expected duration of remedial actions. Any adjustments
9 for inflation since the most recent preceding anniversary date shall be made
10 concurrent with adjustments for changes in cost estimates. The issuance of
11 Ecology's approval of a revised or modified CAP will revise the anniversary date
12 established under this section to become the date of issuance of such revised or
13 modified CAP.

14 7. As detailed in the CAP, institutional controls are required at the Site.
15 Environmental (Restrictive) Covenants will be used to implement the institutional controls.

16 A. In consultation with Defendant, Ecology will prepare the Environmental
17 (Restrictive) Covenants consistent with WAC 173-340-440, RCW 64.70, and any
18 policies or procedures specified by Ecology. The Environmental (Restrictive) Covenants
19 shall restrict future activities and uses of the Site as agreed to by Ecology and Defendant.

20 B. After approval by Ecology, Defendant shall record the Environmental
21 (Restrictive) Covenant for affected properties it owns with the office of the Pierce County
22 Auditor as detailed in the Schedule (Exhibit C). Defendant shall provide Ecology with
23 the original recorded Environmental (Restrictive) Covenants within thirty (30) days of
24 the recording date.

25 8. Unless otherwise directed by Ecology, Defendant shall submit to Ecology written
26 quarterly Progress Reports that describe the actions taken during the previous quarter to

1 implement the requirements of this Decree. All Progress Reports shall be submitted by the tenth
2 (10th) day of the month in which they are due after the effective date of this Decree, and shall
3 be continued until engineering and institutional controls are accomplished in accordance with
4 Exhibit B. Unless otherwise specified in writing by Ecology, Progress Reports and any other
5 documents submitted pursuant to this Decree shall be sent by certified mail, return receipt
6 requested, to Ecology's project coordinator. The Progress Reports shall include the following:

7 A. A list of on-site activities that have taken place during the quarter.

8 B. Description of any sample results which deviate from the norm.

9 C. Detailed description of any deviations from required tasks not otherwise
10 documented in project plans or amendment requests.

11 D. Description of all deviations from the Scope of Work and Schedule during
12 the current quarter and any planned deviations in the upcoming quarter.

13 E. For any deviations in schedule, a plan for recovering lost time and
14 maintaining compliance with the schedule.

15 F. All raw data (including laboratory analyses) received during the previous
16 quarter (if not previously submitted to Ecology), together with a detailed description of
17 the underlying samples collected.

18 G. A list of planned activities for the upcoming quarter.

19 9. Except in the case of an emergency, Defendant agrees not to perform any
20 remedial actions at the Site outside the scope of this Decree without prior written approval of
21 Ecology. In the case of an emergency, Defendant must notify Ecology of the event and remedial
22 action(s) as soon as practical, but no later than twenty-four (24) hours after discovery of the
23 emergency.

24 **VII. DESIGNATED PROJECT COORDINATORS**

25 1. The project coordinator for Ecology is:

26 Marv Coleman, Cleanup Project Manager

1 P.O. Box 47775
2 Olympia, WA 98504-7775
3 360-407-6259
4 mcol461@ecy.wa.gov

5 2. The project coordinator for Defendant is:

6 Sarah Weeks, Environmental Project Manager
7 1 Sitcum Plaza
8 Tacoma, WA 98421
9 253-383-9450
10 sweeks@portoftacoma.com

11 3. Each project coordinator shall be responsible for overseeing the implementation
12 of this Decree. Ecology's project coordinator will be Ecology's designated representative for the
13 Site. To the maximum extent possible, communications between Ecology and Defendant and all
14 documents, including reports, approvals, and other correspondence concerning the activities
15 performed pursuant to the terms and conditions of this Decree shall be directed through the
16 project coordinators. The project coordinators may designate, in writing, working level staff
17 contacts for all or portions of the implementation of the work to be performed required by this
18 Decree.

19 4. Any party may change its respective project coordinator. Written notification
20 shall be given to the other party at least ten (10) calendar days prior to the change.

21 **VIII. PERFORMANCE**

22 1. Except as otherwise provided for by RCW 18.43 and 18.220, all geologic and
23 hydrogeologic work performed pursuant to this Decree shall be under the supervision and
24 direction of a geologist or hydrogeologist licensed by the State of Washington or under the direct
25 supervision of an engineer registered by the State of Washington.

26 2. Except as otherwise provided for by RCW 18.43.130, all engineering work
performed pursuant to this Decree shall be under the direct supervision of a professional engineer
registered by the State of Washington.

1 3. Defendant shall make all reasonable efforts to secure access rights for those
2 properties within the Site not owned or controlled by Defendant where remedial activities or
3 investigations will be performed pursuant to this Decree.

4 4. Ecology or any Ecology authorized representative shall give reasonable notice to
5 the Defendant's Project Coordinator before entering any Site property owned or controlled by
6 Defendant unless an emergency prevents such notice. All Parties who access the Site pursuant
7 to this section shall comply with any applicable health and safety plan(s) or security protocol
8 approved by the Port Commission. Ecology employees and their representatives shall not be
9 required to sign any liability release or waiver as a condition of Site property access.

10 **X. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY**

11 1. With respect to the implementation of this Decree, Defendant shall make the
12 results of all sampling, laboratory reports, and/or test results generated by it or on its behalf
13 available to Ecology by submitting data as detailed in this section. Pursuant to WAC 173-340-
14 840(5), all sampling data shall be submitted to Ecology in both printed and electronic formats in
15 accordance with Section XI (Progress Reports), Ecology's Toxics Cleanup Program Policy 840
16 (Data Submittal Requirements), and/or any subsequent procedures specified by Ecology for data
17 submittal.

18 2. If requested by Ecology, Defendant shall allow Ecology and/or its authorized
19 representative to take split or duplicate samples of any samples collected by Defendant pursuant
20 to the implementation of this Decree. Defendant shall notify Ecology seven (7) days in advance
21 of any sample collection or work activity at the Site. Ecology shall, upon request, allow
22 Defendant and/or its authorized representative to take split or duplicate samples of any samples
23 collected by Ecology pursuant to the implementation of this Decree, provided that doing so does
24 not interfere with Ecology's sampling. Without limitation on Ecology's rights under Section IX
25 (Access), Ecology shall notify Defendant prior to any sample collection activity unless an
26 emergency prevents such notice.

1 activities and uses of the property under this Decree and incorporate any such use restrictions
2 into the transfer documents.

3 **XIII. RESOLUTION OF DISPUTES**

4 1. In the event that Defendant elects to invoke dispute resolution, Defendant must
5 utilize the procedure set forth below.

6 A. Upon the triggering event (receipt of Ecology's project coordinator's
7 written decision or an itemized billing statement), Defendant has fourteen (14) calendar
8 days within which to notify Ecology's project coordinator in writing of its dispute
9 (Informal Dispute Notice).

10 B. The Parties' project coordinators shall then confer in an effort to resolve
11 the dispute informally. The parties shall informally confer for up to fourteen (14)
12 calendar days from receipt of the Informal Dispute Notice. If the project coordinators
13 cannot resolve the dispute within those 14 calendar days, then within seven (7) calendar
14 days Ecology's project coordinator shall issue a written decision (Informal Dispute
15 Decision) stating: the nature of the dispute; the Defendant's position with regards to the
16 dispute; Ecology's position with regards to the dispute; and the extent of resolution
17 reached by informal discussion.

18 C. Defendant may then request regional management review of the dispute.
19 This request (Formal Dispute Notice) must be submitted in writing to the Southwest
20 Region Toxics Cleanup Section Manager within seven (7) calendar days of receipt of
21 Ecology's Informal Dispute Decision. The Formal Dispute Notice shall include a written
22 statement of dispute setting forth: the nature of the dispute; the disputing Party's position
23 with respect to the dispute; and the information relied upon to support its position.

24 D. The Section Manager shall conduct a review of the dispute and shall issue
25 a written decision regarding the dispute (Decision on Dispute) within thirty (30) calendar
26 days of receipt of the Formal Dispute Notice.

1 E. If Defendant finds Ecology's Regional Section Manager's decision
2 unacceptable, Defendant may then request final management review of the decision. This
3 request (Final Review Request) shall be submitted in writing to the Toxics Cleanup
4 Program Manager within seven (7) calendar days of Defendant's receipt of the Decision
5 on Dispute. The Final Review Request shall include a written statement of dispute setting
6 forth: the nature of the dispute; the disputing Party's position with respect to the dispute;
7 and the information relied upon to support its position.

8 F. Ecology's Toxics Cleanup Program Manager shall conduct a review of
9 the dispute and shall issue a written decision regarding the dispute (Final Decision on
10 Dispute) within thirty (30) calendar days of receipt of the Final Review Request. The
11 Toxics Cleanup Program Manager's decision shall be Ecology's final decision on the
12 disputed matter.

13 2. If Ecology's Final Decision on Dispute is unacceptable to Defendant, Defendant
14 has the right to submit the dispute to the Court for resolution. The Parties agree that one judge
15 should retain jurisdiction over this case and shall, as necessary, resolve any dispute arising under
16 this Decree. Under RCW 70.105D.060, Ecology's investigative and remedial decisions shall be
17 upheld unless they are arbitrary and capricious.

18 3. The Parties agree to only utilize the dispute resolution process in good faith and
19 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.
20 Where either party utilizes the dispute resolution process in bad faith or for purposes of delay,
21 the other party may seek sanctions.

22 4. Implementation of these dispute resolution procedures shall not provide a basis
23 for delay of any activities required in this Decree, unless Ecology agrees in writing to a schedule
24 extension or the Court so orders.

25 5. In case of a dispute, failure to either proceed with the work required by this
26 Decree or timely invoke dispute resolution may result in Ecology's determination that

1 insufficient progress is being made in preparation of a deliverable, and may result in Ecology
2 undertaking the work under Section XXV (Implementation of Remedial Action).

3 **XIV. AMENDMENT OF DECREE**

4 1. The Parties may agree to minor changes to the work to be performed without
5 formally amending this Decree. Minor changes will be documented in writing by Ecology.

6 2. Substantial changes to the work to be performed shall require formal amendment
7 of this Decree. This Decree may only be formally amended by a written stipulation among the
8 Parties that is entered by the Court, or by order of the Court. Ecology will provide its written
9 consent to a formal amendment only after public notice and opportunity to comment on the
10 formal amendment. Such amendment shall become effective upon entry by the Court.
11 Agreement to amend the Decree shall not be unreasonably withheld by any party.

12 3. When requesting a change to the Decree, Defendant shall submit a written request
13 to Ecology for approval. Ecology shall indicate its approval or disapproval in writing and in a
14 timely manner after the written request is received. If Ecology determines that the change is
15 substantial, then the Decree must be formally amended. Reasons for the disapproval of a
16 proposed change to this Decree shall be stated in writing. If Ecology does not agree to the
17 requested change, the disagreement may be addressed through the dispute resolution procedures
18 described in Section XIV (Resolution of Disputes).

19 **XV. EXTENSION OF SCHEDULE**

20 1. Defendant's request for an extension of schedule shall be granted only when a
21 request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior
22 to expiration of the deadline for which the extension is requested, and good cause exists for
23 granting the extension. All extensions shall be requested in writing. The request shall specify:

- 24 A. The deadline that is sought to be extended.
25 B. The length of the extension sought.
26 C. The reason(s) for the extension.

1 D. Any related deadline or schedule that would be affected if the extension
2 were granted.

3 2. The burden shall be on Defendant to demonstrate to the satisfaction of Ecology
4 that the request for such extension has been submitted in a timely fashion and that good cause
5 exists for granting the extension. Good cause may include, but may not be limited to:

6 A. Circumstances beyond the reasonable control and despite the due
7 diligence of Defendant including delays caused by unrelated third parties or Ecology,
8 such as (but not limited to) delays by Ecology in reviewing, approving, or modifying
9 documents submitted by Defendant.

10 B. Acts of God, including fire, flood, blizzard, extreme temperatures, storm,
11 or other unavoidable casualty.

12 C. Endangerment as described in Section XVII (Endangerment).

13 3. However, neither increased costs of performance of the terms of this Decree nor
14 changed economic circumstances shall be considered circumstances beyond the reasonable
15 control of Defendant.

16 4. Ecology shall act upon any Defendant's written request for extension in a timely
17 fashion. Ecology shall give Defendant written notification of any extensions granted pursuant to
18 this Decree. A requested extension shall not be effective until approved by Ecology or, if
19 required, by the Court. Unless the extension is a substantial change, it shall not be necessary to
20 amend this Decree pursuant to Section XV (Amendment of Decree) when a schedule extension
21 is granted.

22 5. At Defendant's request an extension shall only be granted for such period of time
23 as Ecology determines is reasonable under the circumstances. Ecology may grant schedule
24 extensions exceeding ninety (90) days only as a result of one of the following:

25 A. Delays in the issuance of a necessary permit which was applied for in a
26 timely manner.

1 B. Other circumstances deemed exceptional or extraordinary by Ecology.

2 C. Endangerment as described in Section XVII (Endangerment).

3 **XVI. ENDANGERMENT**

4 1. In the event Ecology determines that any activity being performed at the Site
5 under this Decree is creating or has the potential to create a danger to human health or the
6 environment, Ecology may direct Defendant to cease such activities for such period of time as it
7 deems necessary to abate the danger. Defendant shall immediately comply with such direction.

8 2. In the event Defendant determines that any activity being performed at the Site
9 under this Decree is creating or has the potential to create a danger to human health or the
10 environment, Defendant may cease such activities. Defendant shall notify Ecology's project
11 coordinator as soon as possible, but no later than twenty-four (24) hours after making such
12 determination or ceasing such activities. Upon Ecology's direction, Defendant shall provide
13 Ecology with documentation of the basis for the determination or cessation of such activities. If
14 Ecology disagrees with Defendant's cessation of activities, it may direct Defendant to resume
15 such activities.

16 3. If Ecology concurs with or orders a work stoppage pursuant to this section,
17 Defendant's obligations with respect to the ceased activities shall be suspended until Ecology
18 determines the danger is abated, and the time for performance of such activities, as well as the
19 time for any other work dependent upon such activities, shall be extended, in accordance with
20 Section XVI (Extension of Schedule), for such period of time as Ecology determines is
21 reasonable under the circumstances.

22 4. Nothing in this Decree shall limit the authority of Ecology, its employees, agents,
23 or contractors to take or require appropriate action in the event of an emergency.

24 **XVII. COVENANT NOT TO SUE**

25 1. Covenant Not to Sue: In consideration of Defendant's compliance with the terms
26 and conditions of this Decree, Ecology covenants not to institute legal or administrative actions

1 against Defendant regarding the release or threatened release of hazardous substances at the Site,
2 as described in Section V.A. Findings of Fact, as detailed in Exhibit A (Site Diagram) which
3 includes only the hazardous substances detailed in Section V.H. Findings of Fact. This Covenant
4 Not to Sue does not cover any other hazardous substance(s) or area, including, but not limited
5 to, releases at Occidental Chemical Corp. Site and wherever they have come to be located.
6 Ecology retains all of its authority relative to any hazardous substance(s) or area not covered by
7 this Decree.

8 This Covenant Not to Sue shall have no applicability whatsoever to:

9 A. Criminal liability.

10 B. Liability for damages to natural resources.

11 C. Any Ecology action, including cost recovery, against PLPs not a party to
12 this Decree.

13 2. Pursuant to RCW 70.105D.040(4)(c), the Court shall amend this Covenant Not
14 to Sue if factors not known at the time of entry of this Decree are discovered and present a
15 previously unknown threat to human health or the environment.

16 3. Reopeners: Ecology specifically reserves the right to institute legal or
17 administrative action against Defendant to require it to perform additional remedial actions at
18 the Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050, under any of
19 the following circumstances:

20 A. Upon Defendant's failure to meet the requirements of this Decree.

21 B. Failure of the remedial action to meet the cleanup standards identified in
22 the CAP (Exhibit A).

23 C. Upon Ecology's determination that remedial action beyond the terms of
24 this Decree is necessary to abate an imminent and substantial endangerment to human
25 health or the environment.
26

1 D. Upon the availability of information previously unknown to Ecology
2 regarding Site factors including the nature, quantity, migration, pathway, or mobility of
3 hazardous substances, and Ecology's determination, in light of this information, that
4 further remedial action is necessary at the Site to protect human health or the
5 environment.

6 E. Upon Ecology's determination that additional remedial actions are
7 necessary to achieve cleanup standards within the reasonable restoration time frame set
8 forth in the CAP.

9 4. Except in the case of an emergency, prior to instituting legal or administrative
10 action against Defendant pursuant to this section, Ecology shall provide Defendant with fifteen
11 (15) calendar days' notice of such action.

12 **XVIII. CONTRIBUTION PROTECTION**

13 1. With regard to claims for contribution against Defendant, the Parties agree that
14 Defendant is entitled to protection against claims for contribution for matters addressed in this
15 Decree as provided by RCW 70.105D.040(4)(d) and as further identified in Section XVII.

16 **XIX. INDEMNIFICATION**

17 1. Defendant agrees to indemnify and save and hold the State of Washington, its
18 employees, and agents harmless from any and all claims or causes of action (1) for death or
19 injuries to persons, or (2) for loss or damage to property to the extent arising from or on account
20 of acts or omissions of Defendant, its officers, employees, agents, or contractors in entering into
21 and implementing this Decree. However, Defendant shall not indemnify the State of Washington
22 nor save nor hold its employees and agents harmless from any claims or causes of action to the
23 extent arising out of the negligent acts or omissions of the State of Washington, or the employees
24 or agents of the State, in entering into or implementing this Decree.

1 substantive requirements of those permits or approvals, as they are known at the time of the
2 execution of this Decree, have been identified in Exhibit B.

3 4. Defendant has a continuing obligation to determine whether additional permits or
4 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
5 action under this Decree. In the event either Ecology or Defendant determines that additional
6 permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the
7 remedial action under this Decree, it shall promptly notify the other party of its determination.
8 Ecology shall determine whether Ecology or Defendant shall be responsible to contact the
9 appropriate state and/or local agencies. If Ecology so requires, Defendant shall promptly consult
10 with the appropriate state and/or local agencies and provide Ecology with written documentation
11 from those agencies of the substantive requirements those agencies believe are applicable to the
12 remedial action. Ecology shall make the final determination on the additional substantive
13 requirements that must be met by Defendant and on how Defendant must meet those
14 requirements. Ecology shall inform Defendant in writing of these requirements. Once established
15 by Ecology, the additional requirements shall be enforceable requirements of this Decree.
16 Defendant shall not begin or continue the remedial action potentially subject to the additional
17 requirements until Ecology makes its final determination.

18 5. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
19 exemption from complying with the procedural requirements of the laws referenced in
20 RCW 70.105D.090(1) would result in the loss of approval from a federal agency that is necessary
21 for the state to administer any federal law, the exemption shall not apply and Defendant shall
22 comply with both the procedural and substantive requirements of the laws referenced in
23 RCW 70.105D.090(1), including any requirements to obtain permits or approvals.

24 **XXI. REMEDIAL ACTION COSTS**

25 1. Defendant shall pay to Ecology costs incurred by Ecology pursuant to this Decree
26 and consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology

1 or its contractors for, or on, the Site under RCW 70.105D, including remedial actions and Decree
2 preparation, negotiation, oversight, and administration. These costs shall include work
3 performed both prior to and subsequent to the entry of this Decree. Ecology's costs shall include
4 costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2).
5 For all costs incurred, Defendant shall pay the required amount within thirty (30) days of
6 receiving from Ecology an itemized statement of costs that includes a summary of costs incurred,
7 an identification of involved staff, and the amount of time spent by involved staff members on
8 the project. A general statement of work performed will be provided upon request. Itemized
9 statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay
10 Ecology's costs within ninety (90) days of receipt of the itemized statement of costs will result
11 in interest charges at the rate of twelve percent (12%) per annum, compounded monthly.

12 2. In addition to other available relief, pursuant to RCW 19.16.500, Ecology may
13 utilize a collection agency and/or, pursuant to RCW 70.105D.055, file a lien against real property
14 subject to the remedial actions to recover unreimbursed remedial action costs.

15 **XXII. IMPLEMENTATION OF REMEDIAL ACTION**

16 1. If Ecology determines that the Defendant has failed to make sufficient progress
17 or failed to implement the remedial action, in whole or in part, Ecology may, after notice to
18 Defendant, perform any or all portions of the remedial action or at Ecology's discretion allow
19 the Defendant opportunity to correct. In an emergency, Ecology is not required to provide notice
20 to Defendant, or an opportunity for dispute resolution. The Defendant shall reimburse Ecology
21 for the costs of doing such work in accordance with Section XXIV (Remedial Action Costs).

22 2. Except where necessary to abate an emergency situation or where required by
23 law, the Defendant shall not perform any remedial actions at the Site outside those remedial
24 actions required by this Decree to address the contamination that is the subject of this Decree,
25 unless Ecology concurs, in writing, with such additional remedial actions pursuant to Section XV
26 (Amendment of Decree). In the event of an emergency, or where actions are taken as required

1 by law, Defendant must notify Ecology in writing of the event and remedial action(s) planned
2 or taken as soon as practical but no later than within twenty-four (24) hours of the discovery of
3 the event.

4 **XXIII. PERIODIC REVIEW**

5 1. So long as remedial action continues at the Site, the Parties agree to review the
6 progress of remedial action at the Site, and to review the data accumulated as a result of
7 monitoring the Site as often as is necessary and appropriate under the circumstances. Unless
8 otherwise agreed to by Ecology, at least every five (5) years after the initiation of cleanup action
9 at the Site the Parties shall confer regarding the status of the Site and the need, if any, for further
10 remedial action at the Site. At least ninety (90) days prior to each periodic review, Defendant
11 shall submit a report to Ecology that documents whether human health and the environment are
12 being protected based on the factors set forth in WAC 173-340-420(4). Under Section XVIII
13 (Covenant Not to Sue), Ecology reserves the right to require further remedial action at the Site
14 under appropriate circumstances. This provision shall remain in effect for the duration of this
15 Decree.

16 **XXIV. PUBLIC PARTICIPATION**

17 1. Ecology shall maintain the responsibility for public participation at the Site.
18 However, Defendant shall cooperate with Ecology, and shall:

19 A. If agreed to by Ecology, develop appropriate mailing lists, prepare drafts
20 of public notices and fact sheets at important stages of the remedial action, such as the
21 submission of work plans, remedial investigation/feasibility study reports, cleanup action
22 plans, and engineering design reports. As appropriate, Ecology will edit, finalize, and
23 distribute such fact sheets and prepare and distribute public notices of Ecology's
24 presentations and meetings.

25 B. Notify Ecology's project coordinator prior to the preparation of all press
26 releases and fact sheets, and before meetings related to remedial action work to be

1 performed at the Site with the interested public and/or local governments. Likewise,
2 Ecology shall notify Defendant prior to the issuance of all press releases and fact sheets
3 related to remedial action work to be performed at the Site, and before meetings related
4 to remedial action work to be performed at the Site with the interested public and/or local
5 governments. For all press releases, fact sheets, meetings, and other outreach efforts by
6 Defendant that do not receive prior Ecology approval, Defendant shall clearly indicate to
7 its audience that the press release, fact sheet, meeting, or other outreach effort was not
8 sponsored or endorsed by Ecology.

9 C. When requested by Ecology, participate in public presentations on the
10 progress of the remedial action at the Site. Participation may be through attendance at
11 public meetings to assist in answering questions, or as a presenter.

12 D. When requested by Ecology, arrange and/or continue information
13 repositories at the following locations:

- 14 i. Citizens for a Healthy Bay
15 917 535 Dock Street
16 Tacoma, WA 98402
253-383-2429
- 17 ii. Ecology's Southwest Regional Office
18 300 Desmond Drive SE
19 Lacey, WA 98503
360-407-6300
- 20 iii. Tacoma Public Library – Main Branch
21 Northwest Room
22 1102 Tacoma Avenue South
23 Tacoma, WA 98402

24 At a minimum, copies of all public notices, fact sheets, and documents relating to public
25 comment periods shall be promptly placed in these repositories. A copy of all documents related
26 to this Site shall be maintained in the repository at Ecology's Southwest Regional Office in
Lacey, Washington.

1 **XXV. DURATION OF DECREE**

2 1. The remedial program required pursuant to this Decree shall be maintained and
3 continued until Defendant has received written notification from Ecology that the requirements
4 of this Decree have been satisfactorily completed. This Decree shall remain in effect until
5 dismissed by the Court. When dismissed, Section XII (Retention of Records), and Section XVIII
6 (Covenant Not to Sue) shall survive.

7 **XXVI. CLAIMS AGAINST THE STATE**

8 1. Defendant hereby agrees that it will not seek to recover any costs accrued in
9 implementing the remedial action required by this Decree from the State of Washington or any
10 of its agencies; and further, that Defendant will make no claim against the State Toxics Control
11 Account, the Local Toxics Control Account, the Environmental Legacy Stewardship Account,
12 or a MTCA Cleanup Settlement Account for any costs incurred in implementing this Decree.
13 Except as provided above, however, Defendant expressly reserves its right to seek to recover
14 any costs incurred in implementing this Decree from any other PLP. This section does not limit
15 or address funding that may be provided under WAC 173-322A.

16 **XXVII. EFFECTIVE DATE**

17 1. This Decree is effective upon the date it is entered by the Court.

18 **XXVIII. WITHDRAWAL OF CONSENT**

19 1. If the Court withholds or withdraws its consent to this Decree, it shall be null and
20 void at the option of any party and the accompanying Complaint shall be dismissed without costs
21 and without prejudice. In such an event, no party shall be bound by the requirements of this
22 Decree.

23 STATE OF WASHINGTON
24 DEPARTMENT OF ECOLOGY

ROBERT W. FERGUSON
Attorney General

25
26 _____
JAMES PENDOWSKI

ALLYSON BAZAN, WSBA # 44221

1 Program Manager
2 Toxics Cleanup Program
3 360-407-7177

Assistant Attorney General
360-586-3589

4
5 Date: _____

Date: _____

6
7 PORT OF TACOMA

8
9 _____
10 JOHN WOLFE
11 Chief Executive Officer
12 253-592-6710

13 Date: _____

14 ENTERED this _____ day of _____ 20____.

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16 _____
17 JUDGE
18 Pierce County Superior Court
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EXHIBIT A
SITE DIAGRAM

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EXHIBIT B

CLEANUP ACTION PLAN

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EXHIBIT C

PUBLIC PARTICIPATION PLAN

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EXHIBIT D

**EXAMPLE ENVIRONMENTAL
COVENANT**