

SW 9.2

FILED  
COUNTY CLERK  
12-19-05

RECEIVED  
JUL 09 1996  
ATTORNEY GENERAL'S OFFICE  
Ecology Div. - Lacey

'96 JUL 5 AM 10 41

WHATCOM COUNTY  
WASHINGTON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,  
  
Plaintiff,  
  
v.  
  
RECOMP OF WASHINGTON, INC., a  
Washington corporation,  
  
Defendant.

NO.  
**96 2 01293 5**  
CONSENT DECREE

TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT . . . . .	2
II. STATEMENT OF PURPOSE . . . . .	2
III. JURISDICTION AND VENUE . . . . .	2
IV. PARTIES BOUND . . . . .	3
V. FINDINGS OF FACT . . . . .	3
VI. CONCLUSIONS OF LAW . . . . .	9
VII. DISCLAIMER . . . . .	10
VIII. WORK TO BE PERFORMED . . . . .	10
IX. SUBMISSIONS/AGENCY APPROVAL . . . . .	12
X. PROJECT COORDINATORS . . . . .	12
XI. NOTICES . . . . .	12
XII. ACCESS . . . . .	13
XIII. RECORD PRESERVATION . . . . .	13
XIV. CONFIDENTIAL BUSINESS INFORMATION . . . . .	14
XV. RESERVATION OF RIGHTS . . . . .	14
XVI. DISPUTE RESOLUTION . . . . .	15
XVII. FORCE MAJEURE . . . . .	16
XVIII. DELAY IN PERFORMANCE/STIPULATED PENALTIES . . . . .	17
XIX. OTHER APPLICABLE LAWS . . . . .	18
XX. INDEMNIFICATION OF THE STATE OF WASHINGTON . . . . .	18
XXI. SEVERABILITY . . . . .	19
XXII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION . . . . .	19
XXIII. TERMINATION AND SATISFACTION . . . . .	19

COPY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11

**I. PRELIMINARY STATEMENT**

12           1.     This Consent Decree ("Decree") is entered into by and between Recomp of  
13 Washington, Inc. ("Recomp") and the Washington State Department of Ecology  
14 ("Ecology"), pursuant to the Washington Hazardous Waste Management Act, Ch. 70.105  
15 RCW, and the Washington Special Incinerator Ash Disposal Act ("Washington Ash Act"),  
16 Ch. 70.138 RCW.

17           2.     This Decree establishes certain requirements for Recomp's permitted on-site  
18 temporary disposal facility ("Disposal Facility") for incinerator ash produced through the  
19 combustion of municipal and other nondangerous solid waste ("ash"). The Disposal  
20 Facility is part of Recomp's facilities for managing solid waste ("Solid Waste Facilities").

21  
22  
23  
24  
25  
26

**II. STATEMENT OF PURPOSE**

          3.     The objective of the parties in entering into this Decree is to close the  
Disposal Facility in accordance with the terms and conditions of this Decree.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

**III. JURISDICTION AND VENUE**

          4.     This Court has jurisdiction over the subject matter and over the parties  
pursuant to the Washington Special Incinerator Ash Disposal Act, Ch. 70.138 RCW, and  
the Washington Hazardous Waste Management Act, Ch. 70.105 RCW. Venue is proper in  
Whatcom County pursuant to RCW 4.12.025.

          5.     Pursuant to RCW 70.105.120 and 70.138.060, the Washington State  
Attorney General has the authority to settle with any person if Ecology finds the proposed  
settlement would lead to more expeditious compliance with the provisions of Ch. 70.105  
RCW and Ch. 70.138 RCW, respectively.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

#### IV. PARTIES BOUND

6. This Decree shall apply to and be binding upon Recomp, its agents, successors, and assigns and upon all persons, contractors, and consultants acting under or on behalf of Recomp and upon Ecology.

7. No change in Recomp's corporate status or change in the ownership of the Solid Waste Facilities, or any portion thereof, shall alter Recomp's obligations under this Decree.

8. By voluntarily entering into this Decree, Recomp: (1) consents to and agrees not to challenge Ecology's authority or jurisdiction in any proceeding initiated solely for the purpose of enforcing this Decree; (2) agrees to undertake all actions required by the terms and conditions of this Decree; and (3) consents to be bound by the requirements set forth herein.

9. Recomp shall provide a copy of this Decree to all contractors, subcontractors, and consultants retained to perform or monitor any portion of the work called for by this Decree on or before the date of such retention and shall condition all such contracts on compliance with the terms of this Decree.

10. Recomp shall give notice of this Decree to any successor in interest prior to transfer of ownership or operation of the Solid Waste Facilities and shall provide Ecology with written notification of such transfer at least thirty (30) days prior to any such transfer.

#### V. FINDINGS OF FACT

11. Recomp is a corporation organized and existing pursuant to the laws of the State of Washington.

12. Recomp is the current owner of property located at 1524 Slater Road, Ferndale, Whatcom County, Washington at which its Solid Waste Facilities are located. The Solid Waste Facilities include, among other things, a municipal solid waste incinerator and the temporary Disposal Facility.

1           13. Recomp's incinerator treats municipal and other non-dangerous solid waste,  
2 including medical waste, and recovers energy for sale to Puget Power. The incinerator is  
3 consistent with Whatcom County's Comprehensive Solid Waste Management Plan approved  
4 by Ecology pursuant to its authority under Ch. 70.95 RCW, and operates under a solid  
5 waste permit granted by the Whatcom County Health Department under Ch. 173-304  
6 WAC. Recomp also recycles a substantial portion of the waste stream. The Disposal  
7 Facility is operated in accordance with a Special Incinerator Ash Disposal Permit granted  
8 under Ch. 70.138 RCW and Ch. 173-306 WAC. In 1990, pursuant to Ch. 173-306 WAC,  
9 Recomp developed an ash management plan that includes measures designed to minimize  
10 harmful constituents in ash (such as battery and metals recycling programs) and imposes  
11 management requirements on the handling, temporary disposal, and transportation of ash.  
12 Recomp's ash management plan was reviewed and approved with conditions by Ecology.  
13 Draft and final environmental impact statements were prepared for construction and  
14 operation of the incinerator. Supplemental environmental review has been performed prior  
15 to the addition of each of several improvements in pollution control or waste management at  
16 the Solid Waste Facilities, such as addition of a "scrubber" for air emissions, construction  
17 of a materials recovery and recycling facility, and construction of the Disposal Facility.

18           14. Recomp, the City of Bellingham, and Whatcom County have a materials  
19 recycling program and battery collection program that allows segregation of a substantial  
20 amount of solid waste from the incinerator-bound waste stream at the Solid Waste  
21 Facilities. Recomp also screens the municipal solid waste brought to the Solid Waste  
22 Facilities for hazardous waste prior to acceptance and as part of processing. Recomp  
23 further has the ability to segregate glass, ferrous metals, scrap paper, cardboard,  
24 newspaper, aluminum cans, household batteries, car batteries and yard waste from the  
25 incinerator-bound waste stream.  
26

1           15. From at least 1988 until May 2, 1994, the United States Environmental  
2 Protection Agency ("EPA") sent conflicting messages, but generally interpreted 42 U.S.C.  
3 § 6921(i) (the "Federal Ash Exclusion") to exempt ash originating at certain resource  
4 recovery facilities from the requirements of Subchapter III of the Solid Waste Disposal Act.  
5 Washington implements parts of Subchapter III, under authority delegated by EPA, through  
6 Ch. 70.105 RCW and regulations promulgated thereunder. RCW 70.105.130. Recomp  
7 qualified for the Federal Ash Exclusion by meeting the following statutory requirements of  
8 42 U.S.C. § 6921(i):

9           (1) the Facility --

10           (A) receives and burns only --

11                 (i) household waste (from single and multiple dwellings, hotels, motels,  
12 and other residential sources), and

13                 (ii) solid waste from commercial or industrial sources that does not  
14 contain hazardous waste identified or listed under 42 U.S.C. § 6921, and

15           (B) does not accept hazardous wastes identified or listed under 42 U.S.C.  
16 § 6921, and

17           (2) Recomp has established contractual requirements and other  
18 appropriate notification and inspection procedures to assure that hazardous wastes  
19 are not received at or burned at the Solid Waste Facilities.

20           16. In 1988, the Washington State Legislature enacted the "Washington Ash  
21 Act," which governed the generation and disposal of ash from incinerators that qualified for  
22 the Federal Ash Exclusion, Ch. 70.138 RCW. Pursuant to the Washington Ash Disposal  
23 Act, Ecology promulgated regulations imposing standards on the management of "special  
24 incinerator ash." Ch. 173-306 WAC. These regulations became effective in May 1990.

25           17. Pursuant to permits issued by the Whatcom County Health Department and  
26 Ecology, Recomp constructed its on-site Disposal Facility in 1989. From 1989 until May

1 2, 1994, Recomp disposed of its ash at the Disposal Facility ("Prior Production"). The  
2 Disposal Facility conforms to the Whatcom County Solid Waste Management Plan. The  
3 Disposal Facility includes a bottom liner, a leachate collection and removal system, and a  
4 network of ground water monitoring wells. Pursuant to Ch. 173-306 WAC and permits  
5 issued by Ecology and the Health Department, Recomp performs regular monitoring of  
6 ground water, surface water and air in the vicinity of the Solid Waste Facilities.

7 18. In reliance on EPA's Federal Ash Exclusion, Ecology regulated and Recomp  
8 managed ash at the Solid Waste Facilities during the period described above in accordance  
9 with and under the jurisdiction of Ch. 70.138 RCW, rather than Subchapter III.

10 19. The United States Supreme Court recently held that the Federal Ash  
11 Exclusion exempts resource recovery facilities meeting the statutory requirements of that  
12 section (see paragraph 15 above) from regulation under Subchapter III as to the treatment,  
13 storage, disposal and other management of hazardous waste (which includes incineration).  
14 Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, \_\_\_\_ U.S. \_\_\_\_ (1994).  
15 The Court also determined that the exemption does not extend to the generation of ash by  
16 such facilities.

17 20. Ash generated at the Solid Waste Facilities is currently sampled quarterly in  
18 accordance with EPA's guidance on Sampling and Analysis of Municipal Refuse Incinerator  
19 Ash (Draft, May 20, 1994). Ash generated at the Solid Waste Facilities since May 2,  
20 1994, has passed the toxicity characteristic leaching procedure ("TCLP") test for lead and  
21 cadmium. All ash generated at the Solid Waste Facilities on and after May 2, 1994  
22 ("Current Production") is permanently disposed at the Regional Disposal Company's Ash  
23 Monofill ("Regional Monofill"), which is specifically designed and permitted for ash. This  
24 Decree does not apply to or affect Current Production.

25 21. Historically, municipal incinerator ash has been designated as hazardous  
26 waste only when concentrations of lead and/or cadmium in the ash were high enough to fail

1 a TCLP test. The Prior Production has been sampled and subjected to a TCLP test for  
2 cadmium and lead. Testing was performed in the late 1980s with mixed results, but regular  
3 TCLP testing of the Prior Production was not performed. (Ashes that pass TCLP and other  
4 Washington dangerous waste tests are legally disposed in "normal" municipal solid waste  
5 landfills. Only ashes that fail TCLP or other Washington dangerous waste tests were  
6 designated "special incinerator ash.") As demonstrated by the test results of samples taken  
7 from fifty (50) different points on a grid of the Prior Production in 1995, the Prior  
8 Production passes TCLP at a high statistical confidence level. The ash is not considered  
9 hazardous waste.

10 22. Although approved by Ecology and constructed by Recomp prior to final  
11 promulgation of Ch. 173-306 WAC, the Disposal Facility was designed to meet those  
12 standards and to contain ash that failed TCLP. Current data from regular sampling of an  
13 extensive system of ground water monitoring wells do not indicate ground water  
14 contamination from the Disposal Facility.

15 23. The Regional Monofill is located in the arid area of eastern Washington  
16 where natural conditions and land use patterns are conducive to environmentally secure  
17 waste disposal. Annual precipitation at the Regional Monofill site averages less than ten  
18 inches. The Regional Monofill is located more than a mile and a half distant from the  
19 nearest residence. Sited on high ground, the facility is also isolated from regional  
20 groundwater supplies. Over three hundred feet of naturally-occurring, highly impermeable  
21 clay layers separate the Regional Monofill from the regional aquifer.

22 24. The Regional Monofill was designed and constructed to meet or exceed the  
23 ash management standards promulgated by the Department of Ecology in 1990. The liner  
24 system consists of a two-foot thick soil layer which is highly impermeable ( $1 \times 10^{-7}$   
25 cm/sec), overlain by a primary geomembrane, a secondary geomembrane, and a series of  
26

1 leachate collection pipes. The proper functioning of these redundant systems is confirmed  
2 through a network of groundwater monitoring wells.

3 25. The Regional Monofill is part of a much larger solid waste disposal complex.  
4 Adjacent to the Regional Monofill, a solid waste landfill operates which is permitted to  
5 accept up to three million tons of waste a year from around the Pacific Northwest and  
6 California. The Regional Monofill has served as the repository for ash from resource  
7 recovery facilities across Washington since 1991. Recomp's Current Production is directed  
8 to the Regional Monofill.

9 26. The large scale of the Regional Monofill and its related facilities subjects the  
10 site to multiple, overlapping regulatory jurisdictions. The facility has a five-year renewable  
11 permit administered by Ecology under Washington's ash management regulations, a land  
12 use permit issued by the Klickitat County Board of Adjustment and administered by the  
13 Klickitat County Planning Department, and a host-county contract (with technical  
14 specifications) administered by the Klickitat County Department of Public Works. The  
15 Southwest Washington Health District administers a solid waste permit that applies to the  
16 adjacent solid waste landfill. These multiple controls result in a high degree of regulatory  
17 and contractual oversight and inspection; technical representatives of Ecology and Klickitat  
18 County are on site on a regular basis.

19 27. The conditions described above for the Regional Monofill differ in several  
20 material ways from those at the Disposal Facility. Whatcom County receives an average of  
21 more than 20 inches of rainfall per year. The Disposal Facility is within one-half mile of  
22 residences and adjacent to other businesses and within 200 feet of sensitive wetlands and  
23 surface water. While the Disposal Facility, like the Regional Monofill, is lined and  
24 provides leachate collection and removal, and ground water monitoring, it was designed and  
25 constructed prior to the effective date of Ecology's ash standards.



1           28. Ecology and Recomp, in consultation with officials from the City of  
2 Bellingham, Whatcom County and the EPA, have concluded that it is in the best interests of  
3 the State of Washington, the public and the environment that the Prior Production be  
4 removed from the Disposal Facility and disposed at an off-site disposal facility that is  
5 designed, constructed and operated exclusively or primarily for disposal of special  
6 incinerator ash as identified and designated in the Washington Ash Act.

#### 7   VI. CONCLUSIONS OF LAW

8           29. The Washington Ash Act, Ch. 70.138 RCW, regulated management,  
9 handling, transportation and disposal of special incinerator ash produced in Washington  
10 from 1987 to May 2, 1994.

11           30. Subchapter III, as interpreted by the Supreme Court in Chicago v.  
12 Environmental Defense Fund, requires that all ash generated subsequent to May 2, 1994 be  
13 tested for hazardous characteristics and disposed in accordance with the rules for disposal of  
14 all non-exempt solid or hazardous wastes. EPA has not published rules, guidance or policy  
15 requiring removal of ash placed in disposal facilities prior to May 2, 1994, and EPA  
16 Region 10 has communicated by memorandum to Ecology that it does not anticipate any  
17 such rule, guidance or policy in the near future and will to defer to states on site-specific  
18 issues. Exhibit A, p. 2 ("Retroactivity").

19           31. The decision in Chicago v. Environmental Defense Fund raises questions  
20 regarding the precise legal status of the Prior Production, given uncertainties relating to the  
21 retroactivity of the Supreme Court's decision, the historic sampling methods used for the  
22 Prior Production and the potential changes in the chemical composition of accumulated  
23 Prior Production.

24           32. Given the uncertain legal status of the Prior Production and the ideal  
25 conditions at the Regional Monofill, it appears that human health and the environment  
26 would be better protected by consolidating the Prior Production with ash at the Regional

1 Monofill, where it would be even more isolated than it now is, and could be regulated more  
2 comprehensively and uniformly with other ash of its kind.

3 33. Ecology may order appropriate actions pursuant to the Washington Ash Act,  
4 Ch. 70.138 RCW, to protect human health and the environment. The actions required by  
5 this Decree protect human health and the environment. This Decree is in the public interest  
6 because permanent disposal of the Prior Production can be most effectively provided by  
7 removing it to a facility specifically designed and permitted for permanent ash disposal,  
8 such as the ash monofill at the Regional Monofill.

#### 9 VII. DISCLAIMER

10 34. Recomp consents and agrees to the terms of this Decree and will perform and  
11 comply with all provisions herein. Except for its consent to jurisdiction in any proceeding  
12 by Ecology to enforce this Decree, Recomp does not admit, accept, acknowledge, or waive  
13 any defenses to any liability or fault with respect to the conditions at or arising from the  
14 Solid Waste Facilities or any permanent disposal facility for the Prior Production. Recomp  
15 agrees, however, not to contest the validity or terms of this Decree in any action brought  
16 by the State of Washington on behalf of Ecology solely to enforce this Decree.

17 35. This Decree is not to be construed and shall not be construed to any extent or  
18 for any purposes as an admission of liability or violation of any private contract or  
19 instrument or of any local, state, or federal ordinance, rule, regulation, or statute, directly,  
20 or indirectly, on the part of Recomp. This Decree shall not be admitted into evidence or  
21 used in any way, directly or indirectly, in any civil or criminal judicial or administrative  
22 proceeding against Recomp or Ecology for any purpose, other than by Ecology or Recomp  
23 to enforce the terms of this Decree.

#### 24 VIII. WORK TO BE PERFORMED

25 36. Recomp shall:  
26

1           a.       Within sixty (60) calendar days of the effective date of this Decree  
2 begin removing the Prior Production from the Disposal Facility and transporting such ash  
3 for disposal to the Regional Monofill or to an Alternate Approved Facility. Any Approved  
4 Facility shall meet or exceed the standards imposed on the Regional Monofill for the  
5 protection of human health and environment. This Decree shall serve as Recomp's notice  
6 to Ecology regarding the removal of the Prior Production as required in the Special  
7 Incinerator Ash Facility Closure Plan (April 1994).

8           b.       Remove the Prior Production from the Disposal Facility at a rate such  
9 that by May 1, 2002 all the Prior Production shall be removed from the Disposal Facility.  
10 Recomp shall remove the Prior Production at a relatively constant yearly rate, but in no  
11 event shall it remove less than ten (10) percent per year of the original total volume of the  
12 Prior Production. The minimum removal percentage shall be prorated for any part of a  
13 calendar year during which this Decree is in effect. The parties recognize, for example,  
14 that this Decree shall be in effect for only part of the 1996 calendar year. This requirement  
15 shall apply upon the effective date of this Consent Decree. It is not intended to prevent  
16 Recomp from removing ash from the Disposal Facility at a faster rate.

17           c.       After all the Prior Production has been removed but by no later than  
18 May 1, 2002, close the Disposal Facility in accordance with the Facility Closure Account  
19 Trust Agreement, dated August 3, 1994. See Exhibit B.

20           d.       For each calendar year until issuance of the Notice of Completion as  
21 provided in paragraph 68 herein submit to Ecology a closure report that indicates the  
22 amount of Prior Production removed from the Disposal Facility, the facility to which such  
23 ash was removed, and any other activities materially related to closure. Reports shall be  
24 due on January 30th for the preceding calendar year for each year prior to the year in  
25 which closure is completed ("Interim Closure Reports"). The report for the year in which  
26 closure is completed ("Final Closure Report") shall be due within thirty (30) days of

1 completion of all closure activities, and such report shall serve as Recomp's notice to  
2 Ecology that closure has been completed.

### 3 IX. SUBMISSIONS/AGENCY APPROVAL

4 37. Ecology shall review the closure reports for consistency with this Decree.

5 38. All reports, documents, and submittals from Recomp to Ecology that  
6 document compliance with the terms of this Decree shall be signed and certified by an  
7 authorized representative of Recomp as to the submittal's accuracy and completeness.

### 8 X. PROJECT COORDINATORS

9 39. Ecology hereby designates John Keeling (whose address, telephone number,  
10 and facsimile number are set forth in Section XI [Notices] below) as its Project  
11 Coordinator.

12 40. Recomp hereby designates Frank Moscone (whose address, telephone number  
13 and facsimile number are set forth in Section XI [Notices] below) as its Project  
14 Coordinator.

15 41. All work performed pursuant to this Decree shall be under the direction and  
16 supervision of Recomp's Project Coordinator. Ecology and Recomp shall each have the  
17 right to change their respective Project Coordinators. Recomp shall provide written notice  
18 to Ecology at least ten (10) days prior to changing its Project Coordinator. Ecology will  
19 provide Recomp with written notice upon any change in its designated Project Coordinator.

20 42. To the maximum extent practicable, all communications between Recomp and  
21 Ecology shall be between the Project Coordinators.

### 22 XI. NOTICES

23 43. All documents including reports, approvals or disapprovals, and other  
24 correspondence to be provided pursuant to this Decree shall be directed to the following  
25 individuals or to such other individuals as Recomp or Ecology may designate in writing.  
26 Documents to be submitted to Recomp are to be sent to:

1 Frank Moscone, President  
2 Recomp of Washington, Inc.  
3 1524 Slater Road  
4 Ferndale, Washington 98248  
5 Phone: (360) 384-1057  
6 Fax: (360) 384-5738

7 Documents to be submitted to Ecology are to be sent to:

8 John Keeling  
9 Northwest Regional Office  
10 Department of Ecology  
11 3190 160th Avenue S.E.  
12 Bellevue, Washington 98008-5452  
13 Phone: (206) 649-7052  
14 Fax: (206) 649-7098

15 Three (3) copies of all reports to be submitted to Ecology pursuant to this Decree shall be  
16 hand delivered or sent by certified mail, return receipt requested, to Ecology's Project  
17 Coordinator, at the address set forth above.

## 18 XII. ACCESS

19 44. Ecology and its authorized representatives shall have access to the Solid  
20 Waste Facilities at all reasonable times for the purpose of reviewing Recomp's progress in  
21 carrying out the provisions of this Decree. Nothing in this Decree shall restrict Ecology's  
22 access rights under Ch. 70.105 RCW or any other statutory authority.

## 23 XIII. RECORD PRESERVATION

24 45. Recomp shall preserve all records or documents in its possession or in the  
25 possession of its agents or contractors which relate to this Decree during the pendency of  
26 this Decree and for a minimum of two (2) years thereafter.

46. Recomp shall notify Ecology in writing at least sixty (60) days prior to  
destruction of any record or document relating to the activities required by this Decree.  
Upon request by Ecology, Recomp shall make available to Ecology such records or copies  
of such records.

1 **XIV. CONFIDENTIAL BUSINESS INFORMATION**

2 47. Recomp may request that all or part of the information submitted pursuant to  
3 this Decree be kept confidential as provided in RCW 43.21A.160. Recomp expressly  
4 consents to the disclosure of all environmental monitoring data and closure reports  
5 submitted to Ecology under the terms of this Decree. Ecology will consider Recomp's  
6 request as set forth in RCW 43.21A.160. If Ecology grants Recomp's request, then the  
7 information covered by such a claim will be disclosed by Ecology only to the extent  
8 permitted by and pursuant to the procedures specified in Ch. 42.17 RCW.

9 **XV. RESERVATION OF RIGHTS**

10 48. Except as provided in paragraph 49a below, nothing in this Decree shall  
11 constitute or be construed as a release from any claim (in law or equity) against any person,  
12 firm, partnership, or corporation for any liability it may have arising out of or relating in  
13 any way to the handling or release of any hazardous waste or hazardous constituent found  
14 at, taken to, or taken from the Solid Waste Facilities.

15 49. Except as provided in paragraph 49a below, Ecology reserves the right to  
16 take further action as necessary to respond under Ch. 70.105 RCW, Ch. 70.138 RCW or  
17 other statutory authority with respect to any conditions or releases at the Solid Waste  
18 Facilities.

19 49a. Upon the termination of this Decree under paragraph 68, Ecology releases  
20 Recomp from any claims it might otherwise assert to compel closure of the Disposal  
21 Facility or to dispose of the Prior Production other than at the approved facility.

22 50. Ecology expressly reserves the right to take any enforcement action pursuant  
23 to Ch. 70.105 RCW, Ch. 70.138 RCW, or other statutory authority or to seek other  
24 injunctive relief, monetary penalties, and punitive damages for any violation of this Decree,  
25 or for violations of any law arising from any actions not specifically addressed or  
26

1 contemplated by this Decree, except as provided in Section XVIII (Delay in  
2 Performance/Stipulated Penalties) herein.

### 3 **XVI. DISPUTE RESOLUTION**

4 51. If Recomp disagrees, in whole or in part, with any disapproval, modification,  
5 or other decision or directive made by Ecology pursuant to this Decree, Recomp shall  
6 notify Ecology in writing of its objections and the bases therefor within ten (10) days of  
7 receipt of such disapproval, modification, decisions, or directive. This notice shall set forth  
8 the specific points of the dispute, the position Recomp maintains should be adopted as  
9 consistent with the requirements of this Decree, the factual and legal bases for Recomp's  
10 position, and all matters Recomp considers necessary for Ecology's determination. Ecology  
11 and Recomp shall then have fifteen (15) days from Ecology's receipt of Recomp's  
12 objections to attempt to resolve the dispute. The parties may agree in writing to an  
13 extension of the fifteen-day time period set forth above. If agreement is reached on the  
14 issue in dispute, the resolution shall be reduced to writing, signed by representatives of  
15 each party and incorporated into this Decree. If the parties are unable to reach agreement  
16 within this fifteen-day period, the parties shall submit their positions to the Court.  
17 Ecology's decision shall be reviewed by the Court in accordance with RCW 34.05.570.

18 52. Recomp is not relieved of its obligation to perform and conduct activities and  
19 submit deliverables while a matter is pending in dispute resolution. If, however, Recomp  
20 prevails in the dispute, deadlines directly affected by the matters in dispute will be extended  
21 for a period of time equal to the time taken to resolve the dispute under the procedures of  
22 this Section, plus reasonable time for remobilization.

23 53. Whether and in what amounts Recomp shall be liable for stipulated penalties  
24 which accrue during the dispute resolution period(s) set forth above shall be resolved by the  
25 Court.  
26

**XVII. FORCE MAJEURE**

1  
2           54. Recomp shall perform the requirements of this Decree within the time limits  
3 set forth herein unless performance is prevented or delayed by an event that is not  
4 foreseeable and beyond Recomp's control, despite Recomp's best efforts to conform to such  
5 schedules. Such events include the availability of a qualified disposal facility in  
6 Washington or Oregon. Such events do not include unanticipated or increased costs of  
7 performance, changed economic circumstances, normal precipitation events, or failure to  
8 obtain federal, state, or local permits in the absence of reasonable and diligent efforts to  
9 obtain such permits.

10           55. Recomp shall immediately notify Ecology orally, and shall also notify  
11 Ecology in writing within ten (10) days, after it becomes aware of an event of a force  
12 majeure. Such notice shall include an estimate of the anticipated length of delay, including  
13 necessary demobilization and remobilization, a description of the cause of the delay and the  
14 measures taken or to be taken to minimize the delay, and an estimated timetable for  
15 implementation of these measures. Recomp shall exercise best efforts to avoid and  
16 minimize the delay.

17           56. If Ecology determines that a delay has been or will be caused by a force  
18 majeure, the time for performance for that element of work may be extended, upon  
19 Ecology approval, for a period equal to the delay resulting from such circumstances. This  
20 extension shall be accomplished through written amendment to this Decree pursuant to  
21 Section XXII (Effective Date and Subsequent Modification). Such an extension does not  
22 alter the schedule for performance or completion of other tasks required by this Decree  
23 unless these are also specifically altered by amendment of the Decree. If Ecology and  
24 Recomp cannot agree that any delay or failure has been or will be caused by a force  
25 majeure, or if there is no agreement on the length of the extension, this dispute shall be  
26



1 resolved in accordance with the Dispute Resolution provisions of Section XVI of this  
2 Decree.

3 **XVIII. DELAY IN PERFORMANCE/STIPULATED PENALTIES**

4 57. Unless there has been a written modification of a compliance date by  
5 Ecology, and subject to Sections XVII (Force Majeure), and Section XVI (Dispute  
6 Resolution), if Recomp fails to meet any requirement of this Decree, Ecology may require  
7 Recomp to pay the stipulated penalties as set forth below.

8 For failure to complete any work required by Section VIII of this Decree:

- 9 a. \$100.00 per day for the first through thirtieth consecutive days of  
10 noncompliance;
- 11 b. \$300.00 per day for the thirty-first day through ninetieth consecutive  
12 days of noncompliance.
- 13 c. \$500.00 per day for the ninety-first through one hundred eightieth  
14 consecutive days of noncompliance; and
- 15 d. \$1,000.00 per day for any additional consecutive days of  
16 noncompliance.

17 58. All penalties owed under this Section shall be due within thirty (30) days of  
18 receipt by Recomp of written demand by Ecology for payment thereof. Interest at the rate  
19 of twelve percent (12%) per annum shall begin to accrue on the unpaid balance at the end  
20 of this thirty-day period. Interest will accrue on the unpaid balance until such penalties and  
21 interest have been paid in full and will be compounded monthly.

22 59. All penalties shall be paid by certified or cashier's check made payable to  
23 "Washington State Treasurer," and shall be remitted to:

24 Department of Ecology  
25 c/o Fiscal Cashier  
26 P.O Box 5128  
Lacey, Washington 98503-0210

1 All payments shall reference Recomp's name and address and the docket number which  
2 appears on the face of this Decree. They shall indicate that they are in payment of  
3 stipulated penalties. A copy of the transmittal of payment shall be sent to Ecology's Project  
4 Coordinator.

5 60. The stipulated penalties set forth in this Section do not preclude Ecology  
6 from pursuing any other remedy or sanction that may be available to Ecology by reason of  
7 Recomp's failure to comply with any of the requirements of this Decree, except that  
8 issuance of stipulated penalties under this Section shall preclude Ecology from issuing  
9 penalties for the same violations under other law. Payment of penalties shall not relieve  
10 Recomp of the responsibility to comply with this Decree.

#### 11 XIX. OTHER APPLICABLE LAWS

12 61. Nothing in this Decree shall relieve Recomp of any requirement or obligation  
13 under any permit, work plan, management plan or closure plan issued or approved prior to  
14 or after the effective date of this Decree.

#### 15 XX. INDEMNIFICATION OF THE STATE OF WASHINGTON

16 62. Recomp agrees to indemnify, save and hold harmless the State of  
17 Washington, its agencies, departments, agents, and employees from any and all claims for  
18 personal injury and/or property damage, or causes of action arising from, or on account of,  
19 acts or omissions of Recomp, its successors and assigns, or any person, independent  
20 contractor, consultant acting under or for Recomp. Neither the State of Washington, nor  
21 any agency, agent or employee thereof, shall be held out as a party to any contract entered  
22 into by Recomp in carrying out activities pursuant to this Decree. Recomp shall be under  
23 no duty, however, to indemnify the State of Washington, its agencies, departments, agents,  
24 and employees for claims or causes of action arising from or on account of negligent acts  
25 or omissions of the State of Washington, its agencies, departments, agents, and employees  
26 in carrying out activities pursuant to this Decree. Nothing herein is intended to or shall be

1 construed as extending the liability of the State of Washington beyond that provided for  
2 under federal or state law.

3 **XXI. SEVERABILITY**

4 63. If any provision or authority of this Decree or the application of this Decree  
5 to any party or circumstances is held by any judicial or administrative authority to be  
6 invalid, the application of such provision to other parties or circumstances and the  
7 remainder of the Decree shall remain in full force and shall not be affected thereby.

8 **XXII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

9 64. The effective date of this Decree shall be the date of the Court's signature  
10 below.

11 65. All times for performance and compliance begin to run from the effective  
12 date of this Decree.

13 66. This Decree may be amended by mutual agreement of Ecology and Recomp  
14 and the consent of the Court. Any such amendments shall be in writing and shall be  
15 effective when such amendments are signed by the Court. Recomp's Project Coordinator  
16 and Ecology's Project Coordinator shall be authorized, without the Court's consent, to  
17 extend by mutual written agreement any date, deadline, or schedule contained herein.

18 67. No informal advice, guidance, suggestions or comments by Ecology  
19 regarding work performed or reports or any other writing submitted by Recomp may be  
20 construed as relieving Recomp of its obligation to obtain such formal approval as may be  
21 required by this Decree.

22 **XXIII. TERMINATION AND SATISFACTION**

23 68. The provisions of this Decree shall be deemed satisfied by Recomp and the  
24 Decree shall terminate upon issuance of written notice from Ecology to Recomp  
25 acknowledging completion of all the terms of this Decree to the satisfaction of Ecology  
26 ("Notice of Completion"). Such notice shall not be unreasonably withheld and shall be

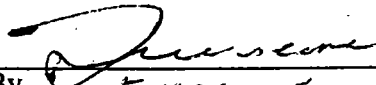
1 provided within ninety (90) days of Ecology's receipt of the Final Closure Report as  
2 referenced in paragraph 36 above.

3 ENTERED this \_\_\_ day of \_\_\_\_\_, 1996.


4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Judge  
Whatcom County Superior Court

The undersigned parties enter into this Consent Decree on the date(s) specified below.  
For Recomp of Washington, Inc.,  
a Washington corporation:

  
By \_\_\_\_\_  
Title F. MOSCONE  
Date PRESIDENT  
JUNE 25-1996

For State of Washington, Department of Ecology:

  
By \_\_\_\_\_  
Title Program Manager - Solid Waste & Financial Assistance  
Date 7/1/96