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PIERCE COUNTY, WASHINGTON
TED RUTT, COUNTY CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

ACE TANK & EQUIPMENT
COMPANY,

Defendant.

NO.

98 2 07617 3

PROSPECTIVE PURCHASER
CONSENT DECREE RE: THE
FORMER TACOMA BOAT
BUILDING COMPANY PROPERTY,
TACOMA, WASHINGTON

PROSPECTIVE PURCHASER CONSENT
DECREE RE: THE FORMER TACOMA
BOATBUILDING COMPANY PROPERTY

i

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 438-7743

CROSS PAY

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EXHIBITS

- Exhibit A: Legal Descriptions
- Exhibit B: Site Map and Diagram
- Exhibit C: Cleanup Action Plan —
- Exhibit D: Restrictive Covenant —

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3 I. INTRODUCTION

4 This prospective purchaser consent decree ("Decree") is made and entered into by and
5 between the Washington State Department of Ecology ("Ecology"), and Ace Tank & Equipment
6 Company ("Ace Tank").

7 1. WHEREAS, the purpose of this Decree is to resolve the potential liability of Ace
8 Tank for known and suspected contamination at the former Tacoma Boatbuilding Company
9 ("Tacoma Boat") property (the "Site") arising from a release or threatened release of hazardous
10 substances and for natural resource damages resulting from the release of hazardous substances;
11 to promote the public interest by expediting cleanup activities at the Site and restoration of
12 natural resources within the Commencement Bay Environment; and to facilitate the cleanup and
13 redevelopment of contaminated industrial properties in Tacoma, Washington. Legal description
14 of the legal parcels that make up the Site are attached as Exhibit A. A Site map and diagram are
15 attached as Exhibit B.

16 2. WHEREAS, Ace Tank has entered into a contract to acquire the Site with the
17 Federal Bankruptcy Court Trustees for Tacoma Boat.

18 3. WHEREAS, Ace Tank has proposed to clean up the Site and make it available for
19 industrial and/or commercial redevelopment, consistent with applicable City of Tacoma zoning
20 provisions and comprehensive plan designations.

21 4. WHEREAS, in the absence of this Decree, at the time it acquires the Site, Ace
22 Tank would incur potential liability under RCW 70.105D.040(1)(a) of the Model Toxics Control
23
24
25
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1 Act ("MTCA") for performing remedial actions, or for paying remedial costs incurred by
2 Ecology and for natural resource damages, resulting from past releases or threatened releases of
3 hazardous substances at the Site, and Ace Tank has certified that it is not otherwise currently
4 liable under MTCA for remedial action at the Site.

5
6 5. WHEREAS, the Site is located within the Commencement Bay
7 Nearshore/Tideflats Superfund Site ("CB N/T").

8 6. WHEREAS, Ace Tank has performed an Environmental Assessment which
9 Ecology has determined is the substantial equivalent to a MTCA Remedial Investigation and
10 Feasibility Study pursuant to WAC 173-340-350 (RI/FS). The RI/FS documents soils and
11 sediments at the Site that exceed MTCA Method A cleanup levels for certain contaminants. In
12 addition, bank and off-shore sediment samples taken at the Site exceed the CB N/T sediment
13 quality objectives (SQOs) levels for certain contaminants.

14
15 7. WHEREAS, although the Trustees have initiated but not yet completed a natural
16 resource damage assessment for the Hylebos Waterway portion of the Commencement Bay
17 Environment, the Trustees have concluded that settlement at this time with Ace Tank is
18 reasonable and in the public interest.

19
20 8. WHEREAS, this Decree promotes the public interest by expediting cleanup
21 activities at the Site and restoration of natural resources in Commencement Bay.

22 9. WHEREAS, Ace Tank will perform the remediation specified in this Decree and
23 the Cleanup Action Plan (CAP), attached as Exhibit C and make a payment to the Trustees for
24 natural resource damages as described in Section IX in exchange for a covenant not to sue and
25 protection from contribution under MTCA.
26

1 10. WHEREAS, Ace Tank's plans for the redevelopment of the Site are not likely to
2 aggravate or contribute to contamination at the Site, interfere with remedial actions that may be
3 needed on the Site, or increase human health risks to persons at or in the vicinity of the Site.

4 11. WHEREAS, this Decree will provide a substantial public benefit by promoting
5 industrial redevelopment and yielding substantial resources for cleanup to prevent migration of
6 contaminants to the Hylebos Waterway and other areas of the Site.

7 12. WHEREAS, Ace Tank's cleanup of soil and sediment contamination will lead to
8 a more expeditious cleanup of hazardous substances and restoration of natural resources at the
9 Site than would otherwise occur, and will promote protection of the public health and the
10 environment.

11 13. WHEREAS, Ace Tank's payment to the state, federal, and tribal trustees will
12 contribute to restoration of natural resources in the Commencement Bay Environment.

13 14. WHEREAS, Ecology has determined that this Decree is not based on
14 circumstances unique to Ace Tank pursuant to RCW 70.105D.040(4)(e)(ii).

15 15. WHEREAS, the Complaint in this action is being filed simultaneously with this
16 Decree. An answer has not been filed, and there has not been a trial on any issue of fact or law in
17 this case. However, the parties wish to resolve the issues raised by Ecology's Complaint. In
18 addition, the parties agree that settlement of these matters without litigation is reasonable and in
19 the public interest and that entry of this Decree is the most appropriate means of resolving these
20 matters.

21 16. WHEREAS, the Court is fully advised of the reasons for entry of this Decree, and
22 good cause having been shown:
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24
25
26

1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

2 **II. AUTHORITY, JURISDICTION AND VENUE**

3 17. This Court has jurisdiction over the subject matter and over the parties pursuant to
4 MTCA, RCW 70.105D. Venue is proper in Pierce County pursuant to RCW 70.105D.050(5)(b).

5 18. Authority is conferred upon the Washington State Attorney General by
6 RCW 70.105D.040(4)(a) and RCW 70.105D.040(5) to agree to a settlement with any potentially
7 liable person ("PLP") if, after public notice and hearing, Ecology finds the proposed settlement
8 would lead to a more expeditious cleanup of hazardous substances in compliance with cleanup
9 standards under RCW 70.105D.030(2)(d). RCW 70.105D.040(4) and RCW 70.105D.040(5)
10 require that such a settlement be entered as a consent decree issued by a court of competent
11 jurisdiction.
12

13 19. Ecology has determined that hazardous substances have been released at the Site.
14 Ecology has not made a determination that Ace Tank is a PLP for the Site and Ace Tank has
15 certified that it is not currently liable under RCW 70.105D. Were Ace to acquire an interest in
16 the Site, however, it could become a PLP as an owner or operator under RCW
17 70.105D.040(1)(a). This Decree is entered prior to Ace Tank's acquisition of the Site to resolve
18 its potential liability for known or suspected Site contamination described in the RI/FS and the
19 CAP and to facilitate a more expeditious cleanup at the Site and restoration of natural resources
20 in the Commencement Bay Environment than otherwise would occur. This Decree is entered
21 pursuant to the authority set forth in RCW 70.105D.040(5).
22

23 20. By entering into this Decree, Ace Tank agrees not to challenge Ecology's
24 jurisdiction in any proceeding to enforce this Decree. Ace Tank consents to the issuance of this
25
26

1 Decree and has agreed to perform cleanup and monitoring and pay oversight costs and make
2 payment to the state, federal and tribal trustees as specified in this Decree.

3 21. All Exhibits attached to this Decree are integral and enforceable parts of this
4 Decree.

5 6 **III. PARTIES BOUND**

7 This Decree shall apply to and be binding upon the signatories to this Decree. The
8 undersigned representative of each party hereby certifies that he or she is fully authorized to enter
9 into this Decree and to execute and legally bind such party to comply with this Decree. Ace
10 Tank agrees to undertake all actions required by the terms and conditions of this Decree and not
11 to contest state jurisdiction regarding this Decree. No change in ownership or corporate status
12 shall alter the responsibility of Ace Tank under this Decree. Ace Tank shall provide a copy of
13 this decree to all agents, contractors and subcontractors retained to perform work required by this
14 Decree and shall ensure that all work undertaken by such contractors and subcontractors will be
15 in compliance with this Decree.
16

17 18 **IV. DEFINITIONS**

19 22. Unless otherwise expressly provided herein, terms used in this Decree that are
20 defined in MTCA or in regulations promulgated under MTCA shall have the meaning assigned
21 to them in MTCA or in such regulations. Whenever terms listed below are used in this Decree or
22 in the attachments hereto, the following definitions shall apply:

23 "Commencement Bay Environment" means the waters of Commencement Bay,
24 Washington, including the shoreline, intertidal areas and bottom sediments, lying south of a line
25 drawn from Point Defiance to Dash Point, and including the Thea Foss Waterway, the Wheeler
26

1 Osgood Waterway, the Middle Waterway, the St. Paul Waterway, the Puyallup River from the
2 mouth south to the present City of Tacoma limits, the Milwaukee Waterway, the Sitcum
3 Waterway, the Blair Waterway and the Hylebos Waterway. This area includes but is not limited
4 to the Commencement Bay Nearshore/Tideflats (CB N/T) Superfund Site, as identified or
5 amended by the United States Environmental Protection Agency, and areas affected by releases
6 of hazardous substances within the CB N/T Superfund Site.

8 "Decree" shall mean this Decree and all attachments hereto. In the event of conflict
9 between this Decree and any exhibit, this Decree shall control.

10 "Natural Resources Damages" means damages, including costs of damages assessment,
11 recoverable under RCW 70.105D, RCW 90.48, or any other state or common law, for injury to,
12 destruction of, or loss of any or all natural resources resulting in whole or in part from the release
13 or threatened release of hazardous substances into the Commencement Bay Environment.

15 "Paragraph" shall mean a portion of this Decree identified by an Arabic numeral.

16 "Section" shall mean a portion of this Decree identified by a Roman numeral and
17 including one or more Paragraphs.

18 "Site" shall mean the Tacoma Boat blocks depicted on Exhibit B and legally described in
19 Exhibit A, attached hereto and incorporated by reference. The Site is a "facility" as defined in
20 MTCA per RCW 70.105D.020(4).

22 "Successors in Interest and Assigns" shall mean any person who acquires an interest in
23 the Site through purchase, lease, transfer, assignment, or otherwise. Any statutory rights and
24 obligations under MTCA of Successors in Interest or Assigns with respect to this Decree are set
25 forth in RCW 70.105D.040(4)(e) and (f) or successor provisions.

1 "Trustees" shall mean the State of Washington, Department of Ecology as lead trustee
2 which acts with federal and tribal trustees as trustees for natural resources in the Commencement
3 Bay Environment.

4 V. STATEMENT OF FACTS

5 23. The Site is located at 1840 Marine View Drive, Tacoma, Washington, and
6 consists of approximately 19 acres. The Site is bordered by the Hylebos Waterway to the
7 southwest, Manke Lumber to the southeast, General Metals of Tacoma to the northwest, and
8 Marine View Drive to the northeast. The Site consists of the former Tacoma Boat Site. A Site
9 map and diagram is attached as Exhibit B.
10

11 24. Tacoma Boat is currently in bankruptcy in Federal District Court in Seattle,
12 Washington. Ace Tank has entered into an agreement approved by the Bankruptcy Court to
13 purchase the Site.
14

15 25. Aerial photographs and historical records indicate that the Site was undeveloped
16 pasture through the late 1960s. Since 1970, Tacoma Boat used the Site to build, maintain and
17 repair ships for commercial and government use.
18

19 26. Activities at the Site included upland and in-water sandblasting of ship hulls and
20 other ship parts, high velocity water spray cleaning (hydroblasting) of ship hulls, painting, and
21 metal cleaning using acid and caustic dip baths.
22

23 27. The Site has been used for industrial purposes and is zoned Industrial by the City
24 of Tacoma. The City of Tacoma has conducted land use planning under RCW 36.70A. Ace
25 Tank intends to facilitate the redevelopment of the Site for industrial and/or commercial uses
26

1 consistent with the applicable City of Tacoma zoning provisions and comprehensive plan
2 designations.

3 28. Environmental contaminants typically associated with past and current Site uses
4 include: heavy metals such as copper, lead, zinc, cadmium and chromium associated with
5 sandblast grit and paint chips. The contaminants of concern are located on the upland paved
6 area, the unpaved bank areas, the launching way, intertidal and subtidal areas, as well as natural
7 resources potentially affected by these areas.

8
9 29. On November 25, 1987, Ecology and Environment, Inc., an engineering
10 consulting firm then serving as the Field Investigation Team for the U.S. Environmental
11 Protection Agency, issued a report entitled "Site Inspection Report for Tacoma Boatbuilding,
12 Tacoma, Washington". The report included analytical results of samples taken of sandblast grit
13 deposited on the Site banks adjacent to Hylebos waterway. The report, Table 5, indicates the
14 sandblast grit residue had concentrations of copper and zinc in excess of CB N/T Sediment
15 Quality Objectives (SQOs). Sample results for copper were 2550 mg/kg and 1890 mg/kg at the
16 two sample locations, while the SQO for copper is 390 mg/kg. Sample results for zinc were
17 5880 mg/kg and 924 mg/kg at the same two sample locations as for the copper samples. The
18 SQO for zinc is 410 mg/kg.

19
20
21 30. On November 26, 1996, a report entitled "Tacoma Boat Site Data Package" was
22 issued by Hart-Crowser, Inc. (an engineering consulting firm) for Heller, Ehrman, White and
23 McAuliffe (a legal firm) working for Ace Tank. The report provides details regarding
24 environmental contamination at the Site.
25
26

1 31. Table C-2 shows bank and intertidally deposited sandblast grit on and adjacent to
2 the Site to be in excess of SQOs for zinc in 3 of 3 samples, for copper in 2 of 3 samples, and for
3 arsenic (SQO = 57 mg/kg) in 2 of 3 samples.

4 32. Table C-3 shows deposited sandblast grit just off shore from the Site to be in
5 excess of SQOs for arsenic in 2 of 3 samples for copper in 2 of 3 samples, and for zinc in 2 of 3
6 samples.

7 33. Table C-5 shows groundwater to exceed MTCA Method A groundwater cleanup
8 standards for total petroleum hydrocarbons in the gasoline and diesel ranges in a well located
9 near the previously excavated underground fuel storage tank near Warehouse #1 on the Site.
10

11 34. As documented in the RI/FS and Cleanup Action Plan, the remedial action to be
12 implemented at the Site includes the removal, excavation, disposal, and/or recycling of spent
13 sandblast grit from the upland, launching way and certain intertidal areas of the Site. The
14 remedy also includes institutional controls as required by WAC 173-340-360(8)(b).
15
16

17 VI. DESCRIPTION OF PLANNED PROJECT

18 35. Ace Tank proposes to acquire the Site.

19 36. Ace Tank proposes to perform a substantial portion of the Site cleanup, and
20 remediate and facilitate the redevelopment of the Site for industrial and/or commercial uses,
21 consistent with the City of Tacoma's zoning and comprehensive plan designations for the Site.
22 Ace Tank will complete its portion of the cleanup and remediation in accordance with the Work
23 to be Performed and Schedule section of this Decree and with the attached Cleanup Action Plan.
24
25
26

1 37. Ace Tank's proposal will ensure the substantial portion of the cleanup and
2 remediation of approximately 19 acres and mitigate existing exposure pathways at the Site. The
3 proposed cleanup and remediation of the Site will prevent migration of contaminants to the
4 Hylebos Waterway and other areas of the CB N/T Superfund Site.
5

6 38. Ace Tank shall be prohibited from using the Site in a manner likely to cause or
7 contribute to the existing release, interfering with remedial actions that may be needed at the
8 Site, or increasing health risks to persons or risks to the environment at or in the vicinity of the
9 Site. Ace Tank also agrees to ensure that its Successors in Interest and Assigns are prohibited
10 from using the Site in a manner likely to cause or contribute to the existing release, interfering
11 with remedial actions that may be needed at the Site, or increasing health risks to persons or risks
12 to the environment at or in the vicinity of the Site.
13

14 VII. WORK TO BE PERFORMED AND SCHEDULE

15 39. This Decree contains a program designed to protect public health, welfare, and the
16 environment from the known suspected, or threatened release of hazardous substances or
17 contaminants at, on, or from the Site. The requirements of such program are described in detail
18 in this section of the Decree and in the Cleanup Action Plan (Exhibit C) and in the schedule set
19 forth in this section.
20

21 40. Ace Tank, through its contractor(s) and subcontractor(s) as necessary, shall
22 accomplish the following tasks and according to the following schedule:
23

- 24 a. Ace Tank shall obtain any and all state, federal, or local permits required
25 by applicable law before commencing the remedial action at the Site,
26 except as provided in Section XXII. This requirement shall include
preparation of a SEPA checklist.

- 1 b. Ace Tank shall prepare a Site Safety and Health Plan in accordance with
2 WAC 173-340-810 and the most recent OSHA, WISHA, Department of
3 Ecology, and EPA guidance and applicable regulations, for Ecology
4 review. This plan shall be submitted to Ecology by _____, 1998.
- 5 c. Ace Tank shall provide a security system at the Site designed to prevent
6 entry by unauthorized persons. Security measures shall be maintained
7 during the duration of this Decree, unless otherwise agreed to by Ecology.
- 8 d. Within thirty (30) days of the effective date of this Decree, Ace Tank shall
9 provide to Ecology a Draft Performance Monitoring Plan per WAC 173-
10 340-410 which shall include:
- 11 i. A proposal for grid system samples designed to confirm the
12 attainment of the Site cleanup levels included in the Cleanup
13 Action Plan (Exhibit C) at the areas of bank and intertidal
14 excavations detailed in the Cleanup Action Plan. The proposal
15 shall include the distance between samples, depth of samples and
16 sample compositing methodology (if any). The proposal shall
17 detail actions to be taken in the event a sample or samples show
18 that the Site cleanup levels have not yet been achieved, including
19 additional excavation and additional confirmational sampling.
- 20 ii. A sampling and analysis plan which details proposed analytical
21 parameters, sampling methodology, sample storage and transport,
22 and QA/QC program for the performance monitoring detailed in
23 subsection a above.
- 24 e. Ace Tank shall provide to Ecology a Final Performance Monitoring Plan
25 within thirty (30) days of issuance of Ecology's written comments
26 regarding the draft plan. The final plan shall include all revisions to the
draft plan as provided in Ecology's written comments.
- f. Ace Tank shall implement the Selected Remedial Alternative as detailed
in the Cleanup Action Plan (Exhibit C). All remedial work shall be
completed on or before October 15, 1998, unless an extension is granted
pursuant to Section XXV of this Decree.
- g. A Post-Remediation Report shall be submitted to Ecology within 120 days
of completion of the remedial work. The report shall include the
following:
- Description of the cleanup actions;
 - Description of the conditions encountered during upland bank area
excavation;
 - Site map showing bank and intertidal area excavation and results of
confirmation sampling;

- Estimates of the quantities of excavated soil/sediment and of imported backfill;
- Summary of confirmational monitoring data;
- Demonstration of attainment of cleanup levels;
- A copy of all receipts and bills of lading, hazardous waste manifests for transportation and disposal of all Site excavated wastes, including all associated transportation and disposal quantities and costs.

41. In the event Ace Tank discovers any contamination not known, documented or suspected to exist on the Site or not suspected to exist off-Site as described in Section V, Ace Tank agrees to comply with all requirements of applicable laws and regulations.

42. For each individual parcel within the Site, Ace Tank shall record the restrictive covenant attached as Exhibit D with the Pierce County Auditor's Office within thirty (30) days of completion of cleanup required under this Decree, and shall provide Ecology with proof of such recording within thirty (30) days of recording.

43. Ace Tank has estimated that it will expend \$805,000 to perform the remedial actions required in this section of the Decree and in the attached Cleanup Action Plan. Although Ace Tank has estimated its costs at \$805,000, it has agreed to complete all of the remedial actions required pursuant to this Decree regardless of cost. Ace Tank also agrees that if the cost of the remedial actions required in the CAP is less than \$805,000, Ace Tank shall perform the Optional Launching Area Excavation such that Ace Tank's combined expenditures for the remedial actions required in the CAP and the Optional Launching Area Excavation total \$807,000, unless the remedial actions required by the CAP and the Optional Launching Area Excavation can be completed for a lesser amount. Ace Tank also agrees that if the cost of the remedial actions required by the CAP equals or exceeds \$805,000, Ace Tank shall spend \$65,000

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1 on the Optional Launching Area Excavation, unless the remedial actions required by the CAP
2 and the Optional Launching Area Excavation can be completed for a lesser amount.

3 4 **VIII. ECOLOGY COSTS**

5 44. Ace Tank agrees to pay all costs incurred by Ecology pursuant to this Decree as of
6 December 1, 1997. The costs required to be paid under this Decree shall include work performed
7 by Ecology or its contractors for, or on, the Site under Ch. 70.105D RCW both before and after
8 the issuance of this Decree for investigations, remedial actions, and Decree preparation,
9 negotiations, oversight and administration. Ecology costs shall include costs of direct activities
10 and support costs of direct activities as defined in WAC 173-340-550(2). Ace Tank has also
11 agreed to reimburse Ecology for the overtime costs associated with any necessary expediting of
12 the public notice process.

13
14 45. Ace Tank agrees to pay Ecology's costs within ninety (90) days of receiving from
15 Ecology an itemized statement of costs that includes a summary of costs incurred, an
16 identification of involved staff, and the amount spent by involved staff members on the project.
17 Ecology shall, upon request, provide Ace Tank a general statement of work performed. Ecology
18 shall prepare itemized statements of its oversight costs quarterly. Failure to pay Ecology's costs
19 within ninety (90) days of receipt of the itemized statement will result in interest charges at the
20 rate of twelve percent (12%) annum.
21

22 **IX. PAYMENT TO THE STATE AND FEDERAL TRUSTEES**

23 46. In addition to conducting the remediation under this Decree, Ace Tank has agreed
24 to pay \$65,000 to federal, state and tribal natural resource trustees under a separate prospective
25 purchaser agreement between EPA and Ace Tank. Under the separate prospective purchaser
26

1 agreement, Ace Tank has also committed to either perform additional cleanup work in the
2 Optional Launching Area or pay EPA up to \$65,000.

3 **X. DESIGNATED PROJECT COORDINATORS**

4 47. The project coordinator for Ecology is:

5 Dom Reale
6 Toxics Cleanup Program
7 Department of Ecology
8 Southwest Regional Office
9 P. O. Box 47775
10 Olympia, WA 98504-7775
11 Telephone: (360) 407-6266

12 The project coordinator for Ace is:

13 Paul Fuglevand
14 DALTON, OLMSTED & FUGLEVAND, INC.
15 1711 Northcreek Parkway S., Suite 101
16 Bothell, WA 98011
17 Telephone: (425) 486-7905

18 48. Each project coordinator shall be responsible for overseeing the implementation
19 of this Decree. The Ecology project coordinator will be Ecology's designated representative at
20 the Site. To the maximum extent possible, communications between Ecology and Ace Tank and
21 all documents, including reports, approvals, and other correspondence concerning the activities
22 performed pursuant to the terms and conditions of this Decree, shall be directed through the
23 project coordinators. The project coordinators may designate, in writing, working-level staff
24 contacts for all or portions of the implementation of the Work to be Performed and attached
25 Cleanup Action Plan. The project coordinators may agreed to minor modifications to the work
26 to be performed without formal amendments to this Decree.

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

1 **XI. PERFORMANCE**

2 50. All work performed pursuant to this Decree shall be under the direction and
3 supervision, as necessary, of a professional engineer or hydrogeologist, or equivalent, with
4 experience and expertise in hazardous waste site investigation and cleanup. Any construction
5 work must be under the supervision of a professional engineer. Ace Tank shall notify Ecology in
6 writing as to the identity of such engineer(s) or hydrogeologist(s), or others and of any
7 contractors and subcontractors to be used in carrying out the terms of this Decree, in advance of
8 their involvement at the Site.
9

10 **XII. CERTIFICATION OF ACE TANK**

11 51. Ace Tank represents and certifies that, to the best of its knowledge and belief, it
12 has fully and accurately disclosed to Ecology the information currently in its possession or
13 control that relates to the environmental conditions at and in the vicinity of the Site, or to Ace
14 Tank's right and title thereto.
15

16 52. Ace Tank represents and certifies that it did not cause or contribute to a release or
17 threatened release of hazardous substances at the Site and is not otherwise potentially liable
18 under RCW 70.105D.040(1), except by becoming an owner of the Site.
19

20 **XIII. TRANSFER OF INTEREST IN PROPERTY**

21 53. Prior to any voluntary or involuntary conveyance or relinquishment of title,
22 easement, leasehold, or other interest in any portion of the Site, Ace Tank shall provide for
23 continued compliance with all of the conditions of this Decree. Prior to transfer of any legal or
24 equitable interest in all or any portion of the Site during the effective period of this Decree, Ace
25 Tank shall serve a copy of this Decree upon any prospective purchaser, lessee, transferee,
26

1 assignee, or other successor in interest of the Site; and, at least thirty (30) days prior to any
2 transfer, Ace Tank shall notify Ecology of said contemplated transfer.

3 54. Ace Tank shall ensure that any future use of the Site is restricted such that
4 activities that would contribute to the existing release or threatened release, interfere with
5 remedial actions at the Site, or increase health risks to persons or risks to the environment at or in
6 the vicinity of the Site are prohibited.

7
8 55. Ace Tank shall also ensure that all future Successors in Interest and Assigns in the
9 Site will provide for compliance with all of the conditions of this Decree.

10 XIV. AMENDMENT TO CONSENT DECREE

11
12 56. This Decree may only be amended by a written stipulation among the parties to
13 this Decree that is thereafter entered and approved by order of the Court. Such amendment shall
14 become effective upon entry by the Court, or upon a later date if such date is expressly stated in
15 the parties' written stipulation or the Court so orders.

16
17 57. Amendments may cover any subject or be for any purpose agreed to by the parties
18 to this Decree. If Ecology determines that the subject of an amendment requires public input,
19 Ecology shall provide thirty (30) days public notice prior to seeking entry of the amendment to
20 the Court.

21 XV. DISPUTE RESOLUTION

22 58. In the event a dispute arises as to an approval, disapproval, proposed
23 modification, or other decision or action by Ecology's project coordinator, the parties shall use
24 the dispute resolution procedure set forth below.
25
26

- 1 (a) Upon receipt of the Ecology project coordinator's decision, Ace Tank has
2 fourteen (14) days to notify Ecology's project coordinator of any objection
3 to the decision.
4 (b) The parties' project coordinators shall then confer in an effort to resolve
5 the dispute. If the project coordinators cannot resolve the dispute within
6 fourteen (14) days, Ecology's project coordinator shall issue a written
7 decision.
8 (c) Ace Tank may then request Ecology management review of the decision.
9 This request shall be submitted in writing to the Toxics Cleanup Program
10 Manager within seven (7) days of receipt of Ecology's project
11 coordinator's written decision.
12 (d) Ecology's Toxics Cleanup Program Manager shall conduct a review of the
13 dispute and shall issue a written decision regarding the dispute within
14 thirty (30) days of Ace Tank's request for review. The Toxics Cleanup
15 Program Manager's decision shall be Ecology's final decision on the
16 disputed matter.

11 59. If Ecology's final written decision is unacceptable to Ace Tank, Ace Tank shall
12 have the right to submit the dispute to the Court for resolution. The parties agree that one judge
13 should retain jurisdiction over this case and shall as necessary, resolve any dispute arising under
14 this Decree. In the event Ace Tank presents an issue to the Court for review, the Court shall
15 review the action or decision of Ecology under an arbitrary and capricious standard of review.
16

17 60. The parties agree to use the dispute resolution process in good faith and agree to
18 expedite, to the extent possible, the dispute resolution process whenever it is used. When either
19 party uses the dispute resolution in bad faith or for purposes of delay, the other party may seek
20 sanctions.
21

22 61. The implementation of these dispute resolution procedures shall not provide a
23 basis for delay of any activities required in this Decree, unless Ecology agrees in writing to a
24 schedule extension or the Court so orders.
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1 magnitude significantly greater than was known at the time of the
2 entry of this Decree which is attributable to Ace Tank.

3 5. In the event the Site is used for any activities that would contribute to
4 the existing release or threatened release, interfere with remedial
5 actions that may be needed at the Site, or increase health risks to
6 persons at or in the vicinity of the Site.

7 6. Ecology reserves the right to take any enforcement action whatsoever,
8 including a cost recovery action, against potentially liable persons not
9 party to this Decree, except as otherwise provided by law.

10 B. Applicability. The Covenant Not To Sue set forth above shall have no
11 applicability whatsoever to:

12 1. Criminal liability; and

13 2. Any Ecology action against PLPs not party to this Decree, except
14 as otherwise provided by law.

15 XVIII. ACE TANK AND EQUIPMENT COMPANY RESERVATION OF RIGHTS

16 64. Ace Tank reserves all rights and defenses which it may have and which are not
17 otherwise addressed in the Decree

18 65. Except as provided herein for Ace Tank, this Decree does not grant any rights or
19 affect any liabilities or any person, firm or corporation or subdivision or division of state, federal,
20 or local government.

21 XIX. DISCLAIMER

22 66. This Decree does not constitute a representation by Ecology that the Site is fit for
23 any particular purpose.

24 XX. RETENTION OF RECORDS

25 67. Ace Tank shall retain all records, reports, documents, and underlying data in its
26 possession relevant to the implementation of this Decree during the pendency of this Decree and
for a period of ten years following the termination of this Decree pursuant to paragraph __, and

1 shall insert in contracts with project contractors and subcontractors a similar records retention
2 requirement. Upon request of Ecology, Ace Tank shall make all non-archived records available
3 to Ecology and allow Ecology access for record review. All archived records shall be made
4 available to Ecology by Ace Tank within a reasonable period of time.

5 6 XXI. SITE ACCESS

7 68. Ace Tank grants to Ecology, its employees, agents, contractors, and authorized
8 representatives, an irrevocable right to enter upon the Site, with reasonable notice and at any
9 reasonable time, for purposes of allowing Ecology to monitor or enforce compliance with this
10 Decree, to institute other necessary cleanup actions, or institute any restoration activities.
11 Ecology or any Ecology authorized representatives shall have the authority to enter and freely
12 move about all property at the Site at all reasonable times for the purposes of, inter alia:
13 inspecting records, operation logs, and contracts related to the work being performed pursuant to
14 this Decree; reviewing Defendant's progress in carrying out the terms of this Decree; conducting
15 such tests or collecting such samples as Ecology may deem necessary; using a camera, sound
16 recording, or other documentary type equipment to record work done pursuant to this Decree;
17 and verifying the data submitted to Ecology by the Defendant. All parties with access to the Site
18 pursuant to this paragraph shall comply with approved health and safety plans.

19 69. Notwithstanding any provision of this Decree, Ecology retains all of its access
20 authorities and access rights, including enforcement authorities related thereto, under MTCA and
21 any other applicable state statute or regulation. Nothing in this Decree shall limit any right of
22 access Ecology may have concerning releases of hazardous substances not addressed by this
23 Decree. Ecology's entry onto the Site for purposes of monitoring or enforcing compliance with
24 this Decree or implementing further remediation at the Site may interfere with Ace Tank's full
25 use of the Site. The right of entry granted in this Section is in addition to any right Ecology may
26 have to enter onto the Site pursuant to specific statutory or regulatory authority. Consistent with

1 Ecology's responsibilities under state and federal law, Ecology, and any persons acting for it,
2 shall use reasonable effort to minimize any interference and use reasonable effort to minimize
3 any interference and use reasonable effort not to interfere with the operations of Ace Tank by any
4 such entry. In the event Ecology enters the Site for reasons other than emergency response,
5 Ecology agrees that it shall provide reasonable advance notice to Ace Tank of any planned entry,
6 as well as schedules and locations of activity on the Site. Ecology further agrees to
7 accommodate reasonable requests that it modify its scheduled entry or activities at the Site.

8 **XXII. OTHER APPLICABLE LAWS**

9 70. All actions carried out by Ace Tank pursuant to this Decree shall be done in
10 accordance with all applicable federal, state, and local requirements, including applicable
11 permitting requirements. Pursuant to RCW 70.105D.090(1), the known and applicable
12 substantive requirements of Chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW, and
13 any laws requiring or authorizing local government permits or approvals for remedial action,
14 have been included in the CAP and are incorporated by reference here as binding and enforceable
15 requirements in this Decree.

16 71. Ace Tank has a continuing obligation to determine whether additional permits or
17 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
18 action under this Decree. In the event either Defendant or Ecology determines that additional
19 permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the
20 remedial action under this Decree, it shall promptly notify the other party of this determination.
21 Ecology shall determine whether Ecology or Defendant shall be responsible to contact the
22 appropriate state and/or local agencies. If Ecology so requires, Ace Tank shall promptly consult
23 with the appropriate state and/or local agencies and provide Ecology with written documentation
24 from those agencies of the substantive requirements those agencies believe are applicable to the
25 remedial action. Ecology shall make the final determination on the additional substantive
26 requirements that must be met by Ace Tank and on how Ace Tank must meet those

1 requirements. Ecology shall inform Ace Tank in writing of these requirements. Once
2 established by Ecology, the additional requirements shall be enforceable requirements of this
3 Decree. Ace Tank shall not begin or continue the remedial action potentially subject to the
4 additional requirements until Ecology makes its final determination.

5 72. Ecology shall ensure that notice and opportunity for comment is provided to the
6 public and appropriate agencies prior to establishing the substantive requirements under this
7 section.

8 73. Pursuant to RCW 70.105D 090(2), in the event that Ecology determines that the
9 exemption from complying with the procedural requirements of the laws referenced in RCW
10 70.105D.090(1) would result in the loss of approval from a federal agency necessary for the state
11 to administer any federal law, such exemption shall not apply and Ace Tank shall comply with
12 both the procedural and substantive requirements of the laws referenced in RCW
13 70.105D.090(1), including any requirements to obtain permits.

14 **XXIII. SAMPLING, DATA REPORTING, AND AVAILABILITY**

15
16 74. With respect to the implementation of this Decree, Ace Tank shall make the
17 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf
18 available to Ecology and shall submit these results in accordance with Section XXIV of this
19 Decree.

20 75. If requested by Ecology, Ace Tank shall allow split or duplicate samples to be
21 taken by Ecology and/or Ecology's authorized representatives of any samples collected by Ace
22 Tank pursuant to the implementation of this Decree. Ace Tank shall notify Ecology at least
23 seven (7) working days in advance of any sample collection or work activity at the Site. Ecology
24 shall, upon request, allow split or duplicate samples to be taken by Ace Tank, or their authorized
25 representatives, of any samples collected by Ecology pursuant to the implementation of this
26 Decree, provided it does not interfere with the Department's sampling. Without limiting

1 Ecology's rights under Section XXI, Ecology shall endeavor to notify Ace Tank at least five (5)
2 working days prior to any sampling collection activity.

3 XXIV. PROGRESS REPORTS

4 76. Ace Tank shall submit to Ecology written monthly progress reports that describe
5 the actions taken during the previous month to implement the requirements of this Decree. The
6 progress report shall include the following:

- 7 A. A list of on-Site activities that have taken place during the month;
8 B. Detailed description of any deviations from required tasks not otherwise
9 documented in project plans or amendment requests;
10 C. Description of all deviations from the schedule during the current month
11 and any planned deviations in the upcoming month;
12 D. For any deviations in schedule, a plan for recovering lost time and
13 maintaining compliance with the schedule;
14 E. All data (including laboratory analyses) which, after the QA/QC program
15 has been performed, has been received by Ace Tank during the past month and an identification
16 of the source of the samples; and
17 F. A list of deliverables for the upcoming month if different from the
18 schedule.

19 77. All progress reports shall be submitted by the tenth day of the month in which
20 they are due after the effective date of this Decree. Unless otherwise specified, progress reports
21 and any other documents submitted pursuant to this Decree shall be sent by certified mail, return
22 receipt requested, to Ecology's project coordinator.

24 XXV. EXTENSION OF SCHEDULE

25 78. An extension of schedule shall be granted only when a request for an extension is
26 submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the

1 deadline for which the extension is requested, and when good cause exists for granting the
2 extension. All extensions shall be requested in writing. The request shall specify the reason(s)
3 the extension is needed.

4 79. An extension shall only be granted for such period of time as Ecology determines
5 is reasonable under the circumstances. A requested extension shall not be effective until
6 approved by Ecology or the Court. Ecology shall act upon any written request for extension in a
7 timely fashion. It shall not be necessary to formally amend this Decree pursuant to Section XI
8 when a schedule extension is granted.

9 80. The burden shall be on Ace Tank to demonstrate to the satisfaction of Ecology
10 that the request for such extension has been submitted in a timely fashion and that good cause
11 exists for granting the extension. Good cause includes, but is not limited to, the following:
12 (1) circumstances beyond the reasonable control and despite the due diligence of Ace Tank,
13 including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays
14 by Ecology in reviewing, approving, or modifying documents submitted by Ace Tank; or
15 (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other
16 unavoidable casualty; or (3) endangerment as described in Section XXVI.

17 81. However, neither increased costs of performance of the terms of the Decree nor
18 changed economic circumstances shall be considered circumstances beyond the reasonable
19 control of Ace Tank.

20 82. Ecology may extend the schedule for a period not to exceed ninety (90) days,
21 except where an extension is needed as a result of:

- 22 (1) Delays in the issuance of a necessary permit that was applied for in a
23 timely manner; or
24 (2) Other circumstances deemed exceptional or extraordinary by Ecology; or
25 (3) Endangerment as described in Section XXVI.
26

1 83. Ecology shall give Ace Tank written notification in a timely fashion of any
2 extensions granted pursuant to this Decree.

3 XXVI. ENDANGERMENT

4 84. In the event Ecology determines that activities implementing or in noncompliance
5 with this Decree, or any other circumstances or activities, are creating or have the potential to
6 create a danger to the health or welfare of the people on the Site or in the surrounding area or to
7 the environment, Ecology may order Ace Tank to stop further implementation of this Decree for
8 such period of time as needed to abate the danger or may petition the Court for an order as
9 appropriate. During any stoppage of work under this Section, the obligations of Ace Tank with
10 respect to the work under this Decree that is ordered to be stopped shall be suspended and the
11 time periods for performance of that work, as well as the time period for any other work
12 dependent upon the work that is stopped, shall be extended, pursuant to Section XXV of this
13 Decree, for such period of time as Ecology determines is reasonable under the circumstances.

14 85. In the event Ace Tank determines that activities undertaken in furtherance of this
15 Decree or any other circumstances or activities are creating an endangerment to the people on the
16 Site or in the surrounding area or to the environment, Ace Tank may stop implementation of this
17 Decree for such period of time necessary for Ecology to evaluate the situation and determine
18 whether Ace Tank should proceed with implementation of the Decree or whether the work
19 stoppage should be continued until the danger is abated. Ace Tank shall notify Ecology's project
20 coordinator as soon as possible, but no later than twenty-four (24) hours after such stoppage of
21 work, and thereafter provide Ecology with documentation of the basis for the work stoppage. If
22 Ecology disagrees with Ace Tank's determination, it may order Ace Tank to resume
23 implementation of this Decree. If Ecology concurs with the work stoppage, Ace Tank's
24 obligations shall be suspended and the time period for performance of that work, as well as the
25 time period for any other work dependent upon the work that was stopped, shall be extended,
26

1 pursuant to Section XXV of this Decree, for such period of time as Ecology determines is
2 reasonable under the circumstances.

3 4 **XXVII. IMPLEMENTATION OF REMEDIAL ACTION**

5 86. If Ecology determines that Ace Tank has failed without good cause to implement
6 the remedial action described herein and in the CAP, Ecology may, after notice to Ace Tank,
7 perform any or all portions of the remedial action that remain incomplete. If Ecology performs
8 all or portions of the remedial action because of Ace Tank's failure to comply with the
9 obligations under this Decree, Ace Tank shall reimburse Ecology for the costs of doing such
10 work in accordance with Section VIII, provided that Ace Tank shall not be obligated under this
11 Section to reimburse Ecology for costs incurred for work inconsistent with or beyond the scope
12 of this Decree.

13 **XXVIII. PUBLIC PARTICIPATION**

14 87. Ecology shall maintain the responsibility for public participation at the Site.
15 However, Ace Tank shall cooperate with Ecology with respect to the following public
16 participation activities:

17 A. Prepare drafts of public notices and fact sheets at important stages of the
18 remedial action, such as the submission of work plans and engineering design reports. Ecology
19 will finalize (including editing if necessary) and distribute such fact sheets and prepare and
20 distribute public notices of Ecology's presentations and meetings;

21 B. Each party shall notify the other party's project coordinator prior to the
22 preparation of all press releases and fact sheets, and at least one week before major meetings with
23 the interested public and local governments regarding the remediation of the Site. Likewise,
24 Ecology shall notify Ace Tank prior to the issuance of all press releases and fact sheets, and
25 before major meetings with the interested public and local governments;

1 C. Participate in public presentations on the progress of the remedial action at
2 the Site. Participation may be through attendance at public meetings to assist in answering
3 questions, or as a presenter;

4 D. In cooperation with Ecology, arrange and/or continue
5 information repositories to be located at the following locations:

6 Tacoma Public Library—Main Branch

7 Northwest Room

8 1102 Tacoma Avenue South

9 Tacoma, Washington 98402-2006

10
11 Department of Ecology

12 Southwest Regional Office

13 300 Desmond Drive S.E.

14 P.O. Box 47775

15 Olympia, Washington 98504-7775

16
17 Citizens for a Health Bay

18 771 Broadway

19 Tacoma, Washington 98402-3700

20 At a minimum, copies of all public notices, fact sheets, and press releases, all quality assured
21 monitoring data, remedial actions plans, supplemental remedial planning documents, and all
22 other similar documents relating to performance of the remedial action required by this Decree
23 shall be promptly placed in these repositories.

1 **XXIX. DURATION OF DECREE AND RETENTION OF JURISDICTION;**
2 **CERTIFICATIONS BY ECOLOGY**

3 88. This Decree shall remain in effect and this Court shall retain jurisdiction over both
4 the subject matter of this Decree and the parties for the duration of the performance of the terms
5 and provisions of this Decree for the purpose of enabling any of the parties to apply to the Court,
6 consistent with the dispute resolution process set forth in Section XV, and the amendment
7 process set forth in Section XIV, for such further order, direction, and relief as may be necessary
8 or appropriate to ensure that obligations of the parties have been satisfied. The Decree shall
9 remain in effect until Ace Tank has received written notification from Ecology that the
10 requirements of this Decree have been satisfactorily completed. Ecology shall provide such
11 written notification or notice of any deficiencies in the completion of the requirements of this
12 Decree within one hundred and eighty (180) days of receiving notice from Ace Tank that the
13 requirements of the Decree have been satisfied. Within sixty (60) days of Ace Tank's written
14 notice that any noted deficiencies have been corrected, Ecology shall provide written notification
15 that the requirements of the Decree have been satisfied or notice of any deficiencies that still
16 remain. The provisions set forth in Section XVI (Contribution Protection), Section XVII
17 (Covenant Not to Sue Under MTCA; Reopeners), Section XXXI (Indemnification), and other
18 such continuing rights of Ace Tank, or Ecology under this Decree shall survive the termination
19 of the Decree pursuant to this paragraph. This Decree shall in no way limit the authority of
20 Ecology to obtain all legal or equitable remedies available against persons not party to this
21 Decree and against all persons, parties or non-parties, for releases of hazardous substances at the
22 Site not addressed by this Decree.

23 89. Certifications by Ecology. In order to facilitate the timely redevelopment of the
24 Site, Ecology shall certify in writing, pursuant to this paragraph, that Ace Tank has completed all
25 cleanup activities that are required pursuant to the CAP, with the exception of the
26

1 implementation of required institutional controls and the capping of hazardous substances that
2 will be implemented through the redevelopment of the Site, if any.

3 4 **XXX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

5 90. This Decree has been the subject of public notice and comment under RCW
6 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a
7 more expeditious cleanup of hazardous substances at the Site, in compliance with applicable
8 cleanup standards, and is in the public interest.

9 91. If the Court withdraws its consent, this Decree shall be null and void at the option
10 of any party and the accompanying complaint shall be dismissed without costs and without
11 prejudice. In such an event, no party shall be bound by the requirements of this Decree. This
12 paragraph shall not create a basis for withdrawal of consent or termination of this Decree other
13 than those created by the terms of this Decree or that exist by operation of law or equity.

14 **XXXI. INDEMNIFICATION**

15 92. Ace Tank agrees to indemnify and save and hold the State of Washington, its
16 employees, and agents harmless from any and all claims or causes of action for death or injuries
17 to persons or for loss or damage to the Site arising from or on account of acts or omissions of
18 Ace Tank its officers, employees, agents, or contractors in entering into and implementing this
19 Decree. However, Ace Tank shall not indemnify the State of Washington nor save nor hold its
20 employees and agents harmless from any claims or causes of action arising out of the negligent
21 acts or omissions of the State of Washington, or employees or agents of the State, in
22 implementing the activities pursuant to this Decree.

23 **XXXII. CLAIMS AGAINST THE STATE**

24
25 93. Ace Tank hereby agrees that they will not seek to recover any costs accrued in
26 implementing the remedial action required by this decree from the State of Washington or any of

1 its agencies and further that Ace Tank will make no claim against the state toxics control account
2 or any local toxics control account for any costs incurred in implementing this decree. Except as
3 provided above, however, Ace Tank expressly reserves its right to seek to recover any costs
4 incurred in implementing this decree from any other PLP.
5

6 **XXXIII. EFFECTIVE DATE**

7 94. This Decree is effective only after the date on which title to the Site vests in Ace
8 Tank and the date on which the Decree is entered by the Court.

9 So ordered this _____ day of _____, 1998

10
11 _____
12 JUDGE
13 Pierce County Superior Court
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1 The undersigned parties enter into this Prospective Purchaser Consent Decree on the date
2 specified below

3 ACE TANK AND EQUIPMENT COMPANY

SUMMIT LAW GROUP P.L.L.C.

4 By: R. Allen Rave

Ralph S. Palumbo
RALPH S. PALUMBO, WSBA #4751

5 DATED March 9, 1998

DATED March 10, 1998

6
7
8 CHRISTINE O. GREGOIRE
Attorney General

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

9
10 Thomas C. Morrill
11 THOMAS C. MORRILL, WSBA #18388
12 MAIA D. BELLON, WSBA #24777
Assistant Attorneys General
Attorneys for Plaintiff
13 State of Washington
Department of Ecology

Mary E. Burg
MARY E. BURG
Program Manager
Toxics Cleanup Program

14 DATED June 1, 1998

DATED 19 May 1998

15
16 CHRISTINE O. GREGOIRE
Attorney General

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

17 Mary McCre
18 MARY MCCREA, WSBA #20160
19 Assistant Attorney General
Attorneys for Ecology

NRDA Client
NRDA CLIENT

20 DATED June 1, 1998

DATED May 19, 1998

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