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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

CITY OF TACOMA and FOSS
WATERWAY DEVELOPMENT
AUTHORITY,

Defendants.

NO. 94-2-10917-6

CONSENT DECREE – FIRST
COMPREHENSIVE AMENDMENT

1. INTRODUCTION	1
2. SCOPE OF DECREE	3
3. JURISDICTION	4
4. PARTIES BOUND	5
5. DEFINITIONS.....	6
6. STATEMENT OF FACTS	7
7. WORK TO BE PERFORMED.....	8
8. INSTITUTIONAL CONTROLS.....	11
9. DESIGNATED PROJECT COORDINATORS.....	12
10. PERFORMANCE.....	13
11. ACCESS	13

1	12. SAMPLING, DATA REPORTING, AND AVAILABILITY	14
2	13. PROGRESS REPORTS.....	14
3	14. RETENTION OF RECORDS	16
4	15. TRANSFER OF INTEREST IN PROPERTY	16
5	16. RESOLUTION OF DISPUTES.....	17
6	17. AMENDMENTS: ADDING NEW PARTIES.....	18
7	18. EXTENSION OF SCHEDULE.....	19
8	19. ENDANGERMENT	21
9	20. OTHER ACTIONS.....	22
10	21. INDEMNIFICATION	23
11	22. COMPLIANCE WITH APPLICABLE LAWS	23
12	23. REMEDIAL AND INVESTIGATIVE COSTS	24
13	24. IMPLEMENTATION OF REMEDIAL ACTION.....	24
14	25. FIVE YEAR REVIEW	25
15	26. PUBLIC PARTICIPATION	25
16	27. DURATION OF DECREE.....	26
17	28. CLAIMS AGAINST THE STATE	27
18	29. COVENANT NOT TO SUE: REOPENER.....	27
19	30. EFFECTIVE DATE.....	30
20	Amended Exhibit A: Map of Cleanup Sites	
21	Amended Exhibit B: Legal Description of Cleanup Sites	
22	Exhibit C: Thea Foss Redevelopment Action Plan – not amended	
23	Exhibit D: Thea Foss Sampling and Analysis Plan – not amended	
24	Exhibit E: Thea Foss Quality Assurance Project Plan – not amended	
25	Exhibit F: Amendment to Consent Decree to Include Site-Specific Cleanup Action Plan	
26	Amended Exhibit G: Successor Owner or Operator Agreement	

1 **1. INTRODUCTION**

2 A. This is the First Comprehensive Amendment to this Consent Decree (Decree).
3 The Decree was originally entered in Pierce County Superior Court on October 17, 1994 as
4 Consent Decree No. 94-2-10917-6. The Decree was originally signed by the Department of
5 Ecology (Ecology), the City of Tacoma (City), and the Metropolitan Park District. The Decree
6 has been amended a number of times since 1994 to add parties to it, including an amendment
7 to add the Foss Waterway Development Authority (FWDA) as a party after the Park District
8 conveyed to the FWDA the properties it owned that are subject to this Decree. Other than
9 these amendments to add parties, there have not previously been any amendments to the
10 provisions of the Decree. This comprehensive amendment makes significant changes to the
11 provisions of the original Decree in order to update it and implement a more efficient process
12 for developing and remediating the properties covered by it.

13 B. This First Comprehensive Amendment to the Decree is made and entered into
14 by and between the Washington State Department of Ecology (Ecology), the City of Tacoma
15 (City), and the Foss Waterway Development Authority (FWDA). Successor Owners or
16 Operators may become Parties to this Decree as provided in Section 17. Parties to this Decree
17 other than Ecology and the Attorney General are referred to in this Decree in the collective as
18 “Defendants.”

19 C. In entering into this Decree, the Parties’ mutual objective is to provide for
20 remedial action at facilities adjacent to the Thea Foss Waterway in the City of Tacoma,
21 Washington, where there have been releases or threatened releases of hazardous substances
22 causing contamination of soils.

23 D. This Decree establishes procedures designed to achieve substantial public
24 benefits. The City and FWDA, with assistance from the Metropolitan Park District, acquired
25 properties along the west side of the Thea Foss Waterway, which is part of the Commencement
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1 Bay Nearshore/Tideflats (CB/NT) Superfund Site, to spur cleanup of the City's waterfront and
2 redevelopment of abandoned industrial and commercial land. This Decree is intended to
3 support cleanup and redevelopment of these properties, consistent with the Thea Foss Area-
4 Wide Consent Decree Cleanup Action Plan, under which the ultimate redevelopment includes
5 public access, parks and open spaces.

6 E. Remedial actions under this Decree recognize land use planning and the
7 ultimate reuse of contaminated property. This Decree promotes expedient, efficient remedial
8 actions, which can occur more quickly than without the Decree. This Decree allows Ecology
9 to enforce permanent and effective controls to ensure that cleanups are protective of human
10 health and the environment. Furthermore, this Decree promotes the fulfillment of Ecology's
11 source control obligations set forth in the 1994 Cooperative Agreement between the U.S.
12 Environmental Protection Agency (EPA) and Ecology.

13 F. This Decree requires the Defendants to undertake the following remedial action
14 for the site or sites they own, which are more specifically described in Sections 7 and 8 of this
15 Decree:

- 16 (1) Conduct remedial investigations of sites;
 - 17 (2) Prepare site-specific Cleanup Action Plans for soil contamination on
18 sites, to be approved by Ecology. The site-specific Cleanup Action
19 Plans will be consistent with the Thea Foss Redevelopment Cleanup
20 Action Plan (Exhibit C);
 - 21 (3) Remediate soil contamination on sites in accordance with the site-
22 specific Cleanup Action Plans;
 - 23 (4) Provide and maintain institutional controls and compliance monitoring,
24 as required in this Decree.
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1 Ecology has determined that these actions are necessary to protect public health and the
2 environment. This Decree addresses soil contamination only. Sites at which active
3 remediation of groundwater is necessary are not within the scope of this Decree.

4 G. The Complaint in this action was filed simultaneously with this Decree in 1994.
5 An answer was not filed, and there has not been a trial on any issue of fact or law in this case.
6 However, the Parties wish to resolve the issues raised by Ecology's complaint. In addition, the
7 Parties agree that settlement of these matters without litigation is reasonable and in the public
8 interest and that entry of this Decree is the most appropriate means of resolving these matters.

9 H. In becoming a party to this Decree, each Defendant agrees to its entry and
10 agrees to be bound by its terms.

11 I. By entering into this Decree, the Parties do not intend to discharge nonsettling
12 parties from any liability they may have with respect to matters alleged in the complaint. The
13 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
14 sums expended under this Decree.

15 J. This Decree shall not be construed as proof of liability or responsibility for any
16 releases of hazardous substances or cost for remedial action nor an admission of any facts;
17 provided, however, that no Defendant may challenge the jurisdiction of Ecology or the
18 findings of fact in this Decree in any proceeding brought by Ecology to enforce this Decree.

19 K. The Court fully advised of the reasons for entry of this Decree, and good cause
20 having been shown:

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

22 **2. SCOPE OF DECREE**

23 A. The property subject to this Decree is property adjacent to the west side of the
24 Thea Foss Waterway in the City of Tacoma, Washington, located between the mean high water
25 mark, the geographic boundary of which is depicted in Amended Exhibit A to this Decree,
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1 which replaces Exhibit A of the original Decree. The legal descriptions of properties within
2 this geographic boundary are in Amended Exhibit B. These properties may extend to the mean
3 low water mark if EPA concurs. Such concurrence shall occur on a parcel-by-parcel basis
4 considering, where appropriate, clean up actions taken under the CB/NT Superfund remedy.

5 B. In this Decree the terms “site” or “cleanup site” mean, in the singular or plural,
6 any properties, parcels or portions thereof within the geographic boundary described in
7 paragraph A that are currently owned by a Defendant or which a Defendant acquires during the
8 duration of this Decree. These sites are “facilities” as defined in RCW 70.105D.020(3).

9 C. Each of the provisions of this Decree apply to each site individually.

10 3. JURISDICTION

11 A. This Court has jurisdiction over the subject matter and over the Parties pursuant
12 to Chapter 70.105D RCW, the Model Toxics Control Act (MTCA).

13 B. Authority is conferred upon the Washington State Attorney General by RCW
14 70.105D.040(4) (a) to agree to a settlement with any potentially liable person if, after public
15 notice and hearing, Ecology finds the proposed settlement would lead to a more expeditious
16 cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that such a settlement be
17 entered as a consent decree issued by a court of competent jurisdiction.

18 C. Ecology has determined that releases or threatened releases of hazardous
19 substances have occurred at the sites which are the subject of this Decree. Ecology has further
20 determined that the releases are causing contamination of soils, surface water and/or
21 groundwater, and will continue to cause contamination unless the releases are remediated.

22 D. Each Defendant is a PLP for each property for which it is an owner or operator
23 under RCW 70.105D.040(I)(a) if Ecology has determined that a release or threatened release
24 of hazardous substances has occurred at that property.

1 E. Each Defendant accepts their status as a PLP for the sites they own. By signing
2 this Decree Defendants waive their right to notice and comment under RCW 70.105D.020(8).
3 However, if additional contamination is discovered after a Defendant signs this Decree, the
4 Defendant retains the right to assert any applicable defenses to liability for the newly-
5 discovered contamination. Furthermore, with regard to claims for contribution against any
6 Defendant for matters addressed in this Decree, Ecology agrees that Defendants are entitled to
7 protection from contribution actions or claims as is provided by MTCA, RCW 70.105D.040, or
8 as otherwise provided by law.

9 F. The actions to be taken pursuant to this Decree are necessary to protect public
10 health, welfare, and the environment.

11 G. Each Defendant agrees to undertake the actions specified in this Decree as they
12 apply to the site or sites owned by each Defendant and consents to the entry of this Decree
13 under the MTCA.

14 **4. PARTIES BOUND**

15 A. This Decree applies to and is binding upon the signatories to this Decree.
16 Successor Owners or Operators may become Parties as provided in Section 17. The
17 undersigned representative of each Party hereby certifies that he or she is fully authorized to
18 enter into this Decree and to execute and legally bind such Party to comply with the Decree.
19 Defendant agrees to undertake all actions required by the terms and conditions of this Decree
20 and not to contest state jurisdiction regarding this Decree, nor to contest any findings of fact in
21 this Decree. No change in ownership, corporate status, or membership of any governing body
22 shall alter the responsibility of a Defendant under this Decree. Each Defendant agrees to
23 utilize contractual and regulatory means to insure the implementation and enforceability of this
24 Decree by and against any subsequent, owner, operator, lessee or tenant of a site. Each
25 Defendant remains liable for all obligations agreed to in this Decree in the event of a sale,
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1 transfer, or assignment of any ownership interest from the Defendant to a third party. Nothing
2 in this Decree prevents the City or the FWDA from negotiating with purchasers, lessees, or
3 other third parties to contractually allocate remedial action costs and responsibilities, provided
4 that such contractual arrangements are not in breach of this Decree and do not affect the City's
5 or FWDA's liability under it.

6 B. Each Defendant shall provide a copy of this Decree to all agents, contractors
7 and subcontractors retained to perform work required by this Decree and shall ensure that all
8 work undertaken by such contractors and subcontractors will be in compliance with this
9 Decree.

10 5. DEFINITIONS

11 Unless otherwise specified, all definitions in Chapters 70.15D RCW and 173-340 WAC
12 apply to the terms in this Decree.

13 A. Active Remediation of Groundwater: For purposes of this Decree, active
14 remediation of groundwater means all remedial actions related to groundwater except for long
15 term monitoring of groundwater and remediation of contaminated soil that is a source of
16 contamination to the groundwater.

17 B. Consent Decree or Decree: Refers to this Consent Decree, each of the exhibits
18 to the Decree, and any amendments to the Decree. All exhibits are integral and enforceable
19 parts of this Consent Decree. In the event of any conflict between the Consent Decree and any
20 exhibits to the Decree, the Consent Decree shall govern.

21 C. Days: Refers to calendar days unless otherwise specified.

22 D. Defendant: Refers to the signatories to this Decree other than the Department
23 of Ecology and Attorney General.

1 E. Party: Refers to any signatory to this Decree. Successor Owners or Operators
2 of property covered by this Decree may become Parties (and Defendants) as provided in
3 Section 17.

4 F. Section: Refers to a portion of this Decree identified by a number and including
5 one or more paragraphs.

6 G. Site or Cleanup Site: Refers to the properties covered by this Decree, as
7 described in Section 2.A of this Decree.

8 H. Successor Owner or Operator: Refers to any person who acquires an interest in
9 a Site, whether through purchase, lease, transfer, or assignment.

10 6. STATEMENT OF FACTS

11 Ecology makes the following finding of facts without any express or implied
12 admissions by Defendants.

13 A. This Decree covers various parcels described in Amended Exhibit A. Many of
14 the parcels were abandoned, unused industrial land. Since approximately 1852, these
15 properties have been the site of various industrial activities. Lumber mills, shipyards, asphalt
16 and concrete plants, flour mills, metal plating and foundry facilities, and other industrial based
17 operations have occurred along the waterway.

18 B. In 1991, the City and the Park District began purchasing some of this property
19 for the purpose of cleanup, redevelopment, and reuse of the City's waterfront for commercial
20 and residential use, including public access, parks and open spaces. In 2000, the Park District
21 transferred its interest in parcels covered under this Decree to the FWDA, which, in turn,
22 intends to transfer its interest in these parcels to developers in accordance with the current
23 Operating Agreement between the City and FWDA. The City or the FWDA may purchase
24 additional parcels adjacent to the waterway, for the same purpose. The Parties agree that if
25 such purchase occurs, they will amend the Decree to include those parcels.

1 C. The City and others have performed independent environmental investigations
2 of the properties subject to this Decree. Under these investigations, soil and groundwater
3 samples were collected, documenting the presence of hazardous substances that exceed the
4 MTCA method B soil cleanup standards under WAC 173-340-740. These hazardous
5 substances are: total petroleum hydrocarbons (TPH); benzene, toluene, ethylbenzene, and
6 xylene (BTEX); polynuclear aromatic hydrocarbons (PAHs); antimony; arsenic; cadmium;
7 chromium; copper; lead; mercury; nickel; zinc; and polychlorinated biphenyls (PCBs).

8 D. In 1993-94, the City prepared an Area-wide Feasibility Study (FS) and Phase I
9 Remedial Investigation. The investigation indicates, and subsequent site-specific remedial
10 investigations confirm, that the properties subject to this Decree have similar physical
11 characteristics, past and future uses, and similar potential contaminant problems, allowing the
12 development of similar cleanup remedies for all the properties.

13 7. WORK TO BE PERFORMED

14 A. This Decree contains a program designed to protect public health, welfare and
15 the environment from the known release, or threatened release, of hazardous substances or
16 contaminants at, on, or from the sites. The work to be performed in this Decree is subject to
17 change by Ecology, as necessary, to incorporate the substantive requirements of state and local
18 laws, as required by RCW 90.105D.090.

19 B. On sites that are subsequently determined to be cleanup sites, exclusive of
20 actions necessary to discover the release of a hazardous substance consistent with WAC 173-
21 340-300, the Defendant shall file a written "Notice of Intent to Proceed" with Ecology. The
22 written Notice of Intent to Proceed shall indicate that the Defendant is prepared to perform
23 remedial actions at the site consistent with this Decree. The Notice shall provide a legal
24 description of the site; the intended use of the site; proof that the Defendant owns the property
25 that makes up the site; and whether the Defendant will be selling, leasing or otherwise
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1 transferring any ownership or possessory interest in the site to a third party, and, if so, the
2 identity of the third party.

3 C. No sooner than 90 days nor later than 120 days after receipt by Ecology of a
4 Notice to Proceed under paragraph 7.B, unless a shorter time is agreed to by Ecology,
5 Defendant shall submit to Ecology a site-specific Remedial Investigation (RI) work plan
6 consistent with WAC 173-340-350. The work plan shall include a site-specific Sampling and
7 Analysis Plan (SSAP) consistent with WAC 173-340-350 and WAC 173-340-820, a site-
8 specific Quality Assurance Project Plan, a site-specific Safety and Health Plan consistent with
9 WAC 173-340-810. The SSAP shall incorporate the elements of the Thea Foss Sampling and
10 Analysis Plan (SAP) and the Thea Foss Quality Assurance Project Plan (QAPP) (Exhibits D
11 and E to this Decree), and shall be modified, as appropriate, by site-specific characteristics and
12 knowledge. Ecology shall review and comment on, but not approve or disapprove, the Safety
13 and Health Plan. The RI work plan shall include a schedule for conducting all RI tasks and
14 submitting all deliverables. The RI work plan shall be submitted to Ecology for review.
15 Ecology will endeavor to review the RI plan and submit any comments to Defendant within 21
16 days of Ecology's receipt of the work plan. Within 21 days of receipt of Ecology's comments,
17 Defendant shall submit a revised RI work plan to Ecology that incorporate Ecology's
18 comments.

19 D. Upon receipt of Ecology's approval of the RI work plan, Defendant shall
20 implement the plan in accordance with the schedule in the approved plan. Within 60 days of
21 completing all work required in the RI work plan, the Defendant shall prepare and submit to
22 Ecology a remedial investigation (RI) report. The report must include the Defendant's analysis
23 of which cleanup action specified in the Thea Foss Redevelopment Cleanup Action Plan,
24 attached as Exhibit C to this Decree, applies to the site and the rationale for that determination.
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1 E. After Ecology determines which cleanup action in Exhibit C applies, Defendant
2 shall prepare a draft site-specific cleanup action plan (SCAP) consistent with WAC 173-340-
3 360 and the Thea Foss Redevelopment Cleanup Action Plan attached as Exhibit C. The draft
4 SCAP shall describe and justify the specific cleanup action proposed for the site, including the
5 specific technologies proposed to be used. The justification for the proposed cleanup action
6 shall be in accordance with WAC 173-340-360. The draft SCAP shall include a schedule for
7 submission of remedial design documents and a compliance monitoring plan. If the selected
8 cleanup action includes institutional controls, the SCAP shall address financial assurances
9 pursuant to WAC 173-340-440(11). Defendant shall submit the draft SCAP to Ecology for
10 approval within 60 days of receipt of Ecology's written notice of decision regarding the
11 appropriate cleanup action for the site. Ecology shall prepare a final draft SCAP, and may
12 modify the draft SCAP as necessary.

13 F. Ecology shall provide public notice and a 30-day comment period for the RI
14 report and the final draft SCAP in accordance with WAC 173-340-600. The public shall be
15 invited to comment upon all information and decisions for which Ecology did not previously
16 provide an opportunity for public comment. If significant public comment is received on these
17 issues, Ecology shall prepare a responsiveness summary responding to the comments and issue
18 it in a timely manner. Ecology shall then issue a final SCAP. Ecology may modify the final
19 draft SCAP based on public comment.

20 G. The final SCAP shall be included as an amendment to the Decree, pursuant to
21 the procedures in Section 17.

22 H. The final SCAP shall be implemented by Defendant. In accordance with the
23 approved time schedule in the SCAP, Defendant shall submit to Ecology for review a draft
24 engineering design report, construction plans and specifications, and an operation and
25 maintenance plan (collectively referred to as remedial design documents) consistent with WAC
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1 opportunity to comment on the proposed restrictive covenant, as required by WAC 173-340-
2 440(6). Ecology, the Attorney General, and the Defendant landowner of the site shall use good
3 faith efforts to reach agreement on the terms of the restrictive covenant. Negotiations on the
4 restrictive covenant shall not exceed 30 days, unless agreed to by the negotiating parties. If
5 these parties cannot reach agreement on the restrictive covenant within the allotted time period,
6 Ecology and the Attorney General shall decide the terms of the restrictive covenant, and such
7 decision shall not be Subject to dispute resolution under this Decree.

8 B. On any site for which a restrictive covenant has been established under
9 paragraph A of this section, within 90 days of the issuance of the final SCAP the Defendant
10 landowner of that site shall record with the Office of the Pierce County Auditor the established
11 restrictive covenant, and provide Ecology and the Attorney General with written confirmation
12 of such recording.

13 C. The City will use available filing and calendaring mechanisms to ensure that
14 parcels subject to this Decree are flagged or otherwise noted with use restrictions through the
15 City's permit system.

16 9. DESIGNATED PROJECT COORDINATORS

17 A. The project coordinator for Plaintiff Ecology is:

18 Marv Coleman
19 Department of Ecology
20 Southwest Regional Office
21 300 Desmond Drive
P.O. Box 47775
Olympia, WA 98504-7775

22 B. For each site, the Defendant shall include the name and address of the project
23 coordinator in the Notice of Intent to Proceed filed with Ecology pursuant to Section 7.B of
24 this Decree.
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1 C. Each project coordinator shall be responsible for overseeing the implementation
2 of this Decree. The Ecology project coordinator will be Ecology's designated representative at
3 the site. To the maximum extent possible, communications between Ecology and the
4 Defendant and all documents, including reports, approvals, and other correspondence
5 concerning the activities performed pursuant to the terms and conditions of this Decree, shall
6 be directed through the project coordinators. The project coordinators may designate, in
7 writing, working level staff contacts for all or portions of the implementation of the remedial
8 work required by this Decree. The project coordinators may agree to minor modifications to
9 the work to be performed without formal amendments to this Decree.

10 D. Any Party may change its respective project coordinator. Written notification
11 shall be given to the other parties at least 10 calendar days prior to the change.

12 10. PERFORMANCE

13 All work performed pursuant to this Decree shall be under the direction and
14 supervision, as necessary, of a professional engineer or hydrogeologist, or equivalent, with
15 experience and expertise in hazardous waste site investigation and cleanup. Any construction
16 work must be under the supervision of a professional engineer. Defendant shall notify Ecology
17 in writing as to the identity of such engineer or hydrogeologist, or others and of any contractors
18 and subcontractors to be used in carrying out the terms of this Decree, in advance of their
19 involvement at the site.

20 11. ACCESS

21 Ecology or any Ecology authorized representatives shall have the authority to enter and
22 freely move about all property at the site at all reasonable times for the purposes of, *inter alia*:
23 inspecting records, operation logs, and contracts related to the work being performed pursuant
24 to this Decree; reviewing Defendant's progress in carrying out the terms of this Decree;
25 conducting such tests or collecting such samples as Ecology may deem necessary; using a
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1 camera, sound recording, or other documentary type equipment to record work done pursuant
2 to this Decree; and verifying the data submitted to Ecology by the Defendant. Upon request,
3 Ecology shall split any samples taken during an inspection unless the Defendant fails to make
4 available a representative for the purpose of splitting samples. All parties with access to the
5 site pursuant to this paragraph shall comply with approved safety and health plans.

6 **12. SAMPLING, DATA REPORTING, AND AVAILABILITY**

7 A. With respect to the implementation of this Decree, Defendant shall make the
8 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf
9 available to Ecology and shall submit these results in accordance with Section 13 of this
10 Decree.

11 B. If requested by Ecology, Defendant shall allow split or duplicate samples to be
12 taken by Ecology and/or its authorized representatives of any samples collected by Defendant
13 pursuant to the implementation of this Decree. Defendant shall notify Ecology five working
14 days in advance of any sample collection or work activity at the site. Ecology shall, upon
15 request, allow split or duplicate samples to be taken by Defendant or its authorized
16 representatives of any samples collected by Ecology pursuant to the implementation of this
17 Decree provided it does not interfere with the Department's sampling. Without limitation on
18 Ecology's rights under Section 11, Ecology shall endeavor to notify Defendant prior to any
19 sample collection activity.

20 **13. PROGRESS REPORTS**

21 A. Defendant shall submit to Ecology written progress reports which describe the
22 actions taken during the previous reporting period to implement the requirements of this
23 Decree. These reports must be submitted quarterly when the Defendant is actively sampling or
24 remediating any site under this Decree. At other times before the remediation process is
25 complete, these progress reports must be submitted annually. After Defendant has received
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1 written notification from Ecology that the requirements of the Decree have been satisfactorily
2 completed under Section 27, Defendant is no longer required to submit progress reports, except
3 that ongoing monitoring reports are required for properties with one or more ground water
4 wells. Nothing in this section affects any obligation by Defendants under this Decree to notify
5 or consult with Ecology. The progress reports shall include the following:

- 6 (1) A list of activities on each site that have taken place during the reporting
7 period;
- 8 (2) Detailed description of any deviations from required tasks not otherwise
9 documented in project plans or amendment requests;
- 10 (3) Description of all deviations from any approved schedules for
11 implementing work under the Decree during the current reporting period
12 and any planned deviations in the upcoming reporting period;
- 13 (4) For any deviations in schedule, a plan for recovering lost time and
14 maintaining compliance with the schedule;
- 15 (5) All raw data (including laboratory analysis) received by the Defendant
16 during the past reporting period and an identification of the source of the
17 sample; and
- 18 (6) A list of deliverables for the upcoming reporting period if different from
19 the schedule.

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

2 A. Unless otherwise specified in this Decree, in the event a dispute arises as to an
3 approval, disapproval, proposed modification or other decision or action by Ecology’s project
4 coordinator, the parties shall utilize the dispute resolution procedure set forth below.

5 (1) Upon receipt of the Ecology project coordinator’s decision, the
6 Defendant has 14 days within which to notify Ecology’s project
7 coordinator of its objection to the decision.

8 (2) The parties’ project coordinators shall then confer in an effort to resolve
9 the dispute. If the project coordinators cannot resolve the dispute within
10 14 days, Ecology’s project coordinator shall issue a written decision.

11 (3) Defendant may then request Ecology management review of the
12 decision. This request shall be submitted in writing to the Toxics
13 Cleanup Program Manager within 7 days of receipt of Ecology’s project
14 coordinator’s decision.

15 (4) Ecology’s Toxics Cleanup Program Manager shall conduct a review of
16 the dispute and shall issue a written decision regarding the dispute
17 within 30 days of the Defendant’s request for review. The Program
18 Manager’s decision shall be Ecology’s final decision on the disputed
19 matter.

20 B. Unless otherwise specified in this Decree, if Ecology’s final written decision is
21 unacceptable to Defendant, Defendant has the right to submit the dispute to the Court for
22 resolution. The Parties agree that one judge should retain jurisdiction over this case and shall,
23 as necessary, resolve any dispute arising under this Decree. In the event Defendant presents an
24 issue to the Court for review, the Court shall review the action or decision of Ecology on the
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1 basis of whether such action or decision was arbitrary and capricious and render a decision
2 based on such standard of review.

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

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

10 **17. AMENDMENTS; ADDING NEW PARTIES**

11 A. Amendments of this Decree that will directly affect all parcels covered by it
12 may be processed through a written stipulation among the Decree signatories that is entered by
13 the Court or by order of the Court. Agreement to amend shall not be unreasonably withheld by
14 any signatory to the Decree. Amendments to the Decree that affect only specific parcels
15 require written stipulation by Ecology, the City, the FWDA, and the affected Party. This
16 includes amendments to add a new party and amendments to include a site-specific cleanup
17 action plan (SCAP). All amendments shall become effective upon entry by the Court.

18 B. With respect to amendments of the Decree for the purpose of including SCAPs,
19 after Ecology issues a final SCAP for a site, with the concurrence of the Attorney General, the
20 signatories shall sign a copy of Exhibit F, an “Amendment to Consent Decree to Include Site
21 Specific Cleanup Action Plan” and it shall be submitted for entry with the Court.

22 C. Defendants may amend the Consent Decree to make a Successor Owner or
23 Operator a party to the Decree, using the following procedure. Any proposed Successor
24 Owner or Operator that will design or construct a cleanup action must become a party to the
25 Decree by signing a copy of the “Successor Owner or Operator Agreement” in Amended
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1 Exhibit G, thereby consenting to be bound by the terms and conditions of this Decree as it
2 applies to the particular parcel in which they are assuming an interest. This Agreement does
3 not make new Parties jointly and severally liable for Sites for which they are not a Successor
4 Owner or Operator. The signed Successor Owner or Operator Agreement shall be sent to
5 Ecology. If Ecology and the Attorney General consent to the proposed amendment, the
6 Amendment shall be submitted for entry with the Court. This Decree is not a unique
7 circumstances consent decree under RCW 70.105D.040(4)(e)(ii).

8 D. After this Decree has been amended to include a final SCAP for a particular
9 site, any Successor Owner or Operator of that site who is not a party to this Decree and who
10 meets the criteria in RCW 70.105D.040(4)(e)(i) is not subject to enforcement by the State and
11 is not liable for claims for contribution regarding matters addressed in the settlement.

12 E. For all amendments not covered by paragraphs B and C of this section,
13 Defendant shall submit any request for an amendment to Ecology and the Attorney General for
14 approval. Ecology shall indicate its approval or disapproval in a timely manner after the
15 request for amendment is received. If the amendment to the Decree is substantial, Ecology
16 will provide public notice and opportunity for comment. Reasons for the disapproval shall be
17 stated in writing. If Ecology or the Attorney General does not agree to any proposed
18 amendment, the disagreement may be addressed through the dispute resolution procedures
19 described in Section 16 of this Decree.

20 18. EXTENSION OF SCHEDULE

21 A. An extension of schedule shall be granted only when a request for an extension
22 is submitted in a timely fashion, generally at least 30 days prior to expiration of the deadline
23 for which the extension is requested, and good cause exists for granting the extension. All
24 extensions shall be requested in writing. The request shall specify the reason the extension
25 is needed.

1 An extension shall only be granted for such period of time as Ecology determines is
2 reasonable under the circumstances. A requested extension shall not be effective until
3 approved by Ecology or the Court. Ecology shall act upon any written request for extension in
4 a timely fashion. It shall not be necessary to formally amend this Decree pursuant to Section
5 17 when a schedule extension is granted.

6 B. The burden shall be on the Defendant to demonstrate to the satisfaction of
7 Ecology that the request for such extension has been submitted in a timely fashion and that
8 good cause exists for granting the extension. Good cause includes, but is not limited to, the
9 following.

- 10 (1) Circumstances beyond the reasonable control and despite the due
11 diligence of Defendant including delays caused by unrelated third
12 parties or Ecology, such as (but not limited to) delays by Ecology in
13 reviewing, approving, or modifying documents submitted by Defendant;
14 or
- 15 (2) Acts of God, including fire, flood, blizzard, extreme temperatures,
16 storm, or other unavoidable casualty; or
- 17 (3) Endangerment as described in Section 19.

18 However, neither increased costs of performance of the terms of the Decree nor
19 changed economic circumstances shall be considered circumstances beyond the reasonable
20 control of Defendant.

21 C. Ecology may extend the schedule for a period not to exceed 90 days, except
22 where an extension is needed as a result of:

- 23 (1) Delays in the issuance of a necessary permit which was applied for in a
24 timely manner; or

- 1 (2) Other circumstances deemed exceptional or extraordinary by Ecology;
2 or
3 (3) Endangerment as described in Section 19.

4 Ecology shall give Defendant written notification in a timely fashion of any extensions
5 granted pursuant to this Decree.

6 **19. ENDANGERMENT**

7 A. In the event Ecology determines that activities implementing or in
8 noncompliance with this Decree, or any other circumstances or activities, are creating or have
9 the potential to create a danger to the health or welfare of the people on the site or in the
10 surrounding area or to the environment, Ecology may order Defendant to stop further
11 implementation of this Decree for such period of time as needed to abate the danger or may
12 petition the Court for an order as appropriate. During any stoppage of work under this section,
13 the obligations of Defendant with respect to the work under this Decree which is ordered to be
14 stopped shall be suspended and the time periods for performance of that work, as well as the
15 time period for any other work dependent upon the work which is stopped, shall be extended,
16 pursuant to Section 18 of this Decree, for such period of time as Ecology determines is
17 reasonable under the circumstances.

18 B. In the event Defendant determines that activities undertaken in furtherance of
19 this Decree or any other circumstances or activities are creating an endangerment to the people
20 on the site or in the surrounding area or to the environment, Defendant may stop
21 implementation of this Decree for such period of time necessary for Ecology to evaluate the
22 situation and determine whether Defendant should proceed with implementation of the Decree
23 or whether the work stoppage should be continued until the danger is abated. Defendant shall
24 notify Ecology's project coordinator as soon as possible, but no later than 24 hours after such
25 stoppage of work, and thereafter provide Ecology with documentation of the basis for the work
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1 stoppage. If Ecology disagrees with the Defendant's determination, it may order Defendant to
2 resume implementation of this Decree. If Ecology concurs with the work stoppage, the
3 Defendant's obligations shall be suspended and the time period for performance of that work,
4 as well as the time period for any other work dependent upon the work which was stopped,
5 shall be extended, pursuant to Section 18 of this Decree, for such period of time as Ecology
6 determines is reasonable under the circumstances. Any disagreements pursuant to the clause
7 shall be resolved through the dispute resolution procedures in Section 16.

8 **20. OTHER ACTIONS**

9 A. Ecology reserves its rights to institute remedial action at the site and
10 subsequently pursue cost recovery, and Ecology reserves its rights to issue orders and/or
11 penalties or take any other enforcement action pursuant to available statutory authority under
12 the following circumstances:

- 13 (1) Where Defendant fails, after notice, to comply with any requirement of
14 this Decree;
- 15 (2) In the event or upon the discovery of a release or threatened release not
16 addressed by this Decree;
- 17 (3) Upon Ecology's determination that action beyond the terms of this
18 Decree is necessary to abate an emergency situation which threatens
19 public health or welfare or the environment; or
- 20 (4) Upon the occurrence or discovery of a situation beyond the scope of
21 this Decree as to which Ecology would be empowered to perform any
22 remedial action or to issue an order and/or penalty, or to take any other
23 enforcement action. This Decree is limited in scope to each site
24 described in Section 2 and to those types and maximum concentrations
25 of hazardous substances that are on site at the time this Decree is
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1 entered, and are described in Section 3.2 of the Thea Foss
2 Redevelopment Cleanup Action Plan, attached as Exhibit C.

3 B. Ecology reserves all rights regarding the injury to, destruction of, or loss of
4 natural resources resulting from the release or threatened release of hazardous substances from
5 each site.

6 C. Ecology reserves the right to take any enforcement action whatsoever, including
7 a cost recovery action, against potentially liable persons not party to this Decree.

8 D. Ecology reserves the right to remove all or a portion of a site from this Decree
9 and take separate enforcement actions against Defendants at that site if Ecology determines it
10 is necessary to do so to meet Ecology's source control obligations under the 1994 Cooperative
11 Agreement between Ecology and EPA.

12 **21. INDEMNIFICATION**

13 Each Defendant agrees to indemnify and save and hold the State of Washington, its
14 employees, and agents harmless from any and all claims or causes of action for death or
15 injuries to persons or for loss or damage to property arising from or on account of acts or
16 omissions of Defendant, its officers, employees, agents, or contractors in entering into and
17 implementing this Decree. However, no Defendant is obligated to indemnify the State of
18 Washington, or save or hold its employees and agents harmless, from any claims or causes of
19 action arising out of the negligent acts or omissions of the State of Washington, or the
20 employees or agents of the state, in implementing the activities pursuant to this Decree.

21 **22. COMPLIANCE WITH APPLICABLE LAWS**

22 All actions carried out by a Defendant pursuant to this Decree shall be done in
23 accordance with all applicable federal, state, and local requirements, including requirements to
24 obtain necessary permits.
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1 portions of the remedial action because of the Defendant's failure to comply with its
2 obligations under this Decree, Defendant shall reimburse Ecology for the costs of doing such
3 work in accordance with Section 23, provided that Defendant is not obligated under this
4 section to reimburse Ecology for costs incurred for work inconsistent with or beyond the scope
5 of this Decree.

6 **25. FIVE YEAR REVIEW**

7 As remedial action, including ground water monitoring, continues at the site, the parties
8 agree to review the progress of remedial action at the site, and to review the data accumulated
9 as a result of site monitoring as often as is necessary and appropriate under the circumstances.
10 At least every five years the parties shall meet to discuss the status of the site and the need, if
11 any, of further remedial action at the site. Ecology reserves the right to require further
12 remedial action at the site under appropriate circumstances. This provision shall remain in
13 effect for the duration of the Decree.

14 **26. PUBLIC PARTICIPATION**

15 Ecology shall maintain the responsibility for public participation at each site. However,
16 each Defendant shall cooperate with Ecology and, if agreed to by Ecology, shall:

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 the completion of engineering
19 design. Ecology will finalize (including editing if necessary) and distribute such fact sheets
20 and prepare and distribute public notices of Ecology's presentations and meetings;

21 B. Notify Ecology's project coordinator prior to the preparation of all press
22 releases and fact sheets, and before major meetings with the interested public and local
23 governments. Likewise, Ecology shall notify Defendant prior to the issuance of all press
24 releases and fact sheets, and before major meetings with the interested public and local
25 governments;

1 C. Participate in public presentations on the progress of the remedial action at the
2 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 information repositories
5 to be located at the Tacoma Public Library, Main Branch, and Ecology's Southwest Regional
6 Office. At a minimum, copies of all public notices, fact sheets, and press releases; all quality
7 assured ground water, surface water, soil sediment, and air monitoring data; remedial actions
8 plans, supplemental remedial planning documents, and all other similar documents relating to
9 performance of the remedial action required by this Decree shall be promptly placed in these
10 repositories.

11 **27. DURATION OF DECREE**

12 A. This Decree shall remain in effect and the remedial program described in the
13 Decree shall be maintained and continued for a Site until the Defendant has received written
14 notification from Ecology that the requirements of this Decree have been satisfactorily
15 completed as to that site. Upon completion of active remedial actions specified under the
16 SCAP, a Defendant may request, and if warranted Ecology will issue, a written confirmation
17 that such active remedial actions have been completed.

18 B. This Decree shall apply to any property within the geographic boundary
19 described in Amended Exhibit A for which Ecology has received a Notice of Intent to Proceed
20 under Section 7.B within 5 years of the effective date of this Decree, or within 5 years of the
21 effective date of the First Comprehensive Amendment to the Decree.

22 C. After five years from the effective date of the First Comprehensive Amendment
23 to this Decree:

- 24 (1) Ecology and the Attorney General at their convenience may terminate
25 this Decree as to any site not within the scope of paragraph B of this
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1 section at any time prior to or within 21 days of receipt of a Notice of
2 Intent to Proceed under Section 7.B of this Decree, by providing 60 days
3 written notice of termination to Defendant.

- 4 (2) Defendant at its convenience may terminate this Decree as to any site
5 not within the scope of paragraph B of this section at any time prior to
6 receipt by Ecology of a Notice of Intent to Proceed, by providing 60
7 days written notice to Ecology and the Attorney General.

8 **28. CLAIMS AGAINST THE STATE**

9 Each Defendant hereby agrees that it will not seek to recover any costs accrued in
10 implementing the remedial action required by this Decree from the State of Washington
11 Department of Ecology; and further, that the Defendant will make no claim against the state
12 Toxics Control Account for any costs incurred in implementing this Decree. Except as
13 provided above, however, Defendant expressly reserves its right to seek to recover any costs
14 incurred in implementing this Decree from any other potentially liable person under state or
15 federal law.

16 **29. COVENANT NOT TO SUE: REOPENER**

17 In consideration of Defendant's compliance with provisions of this Decree, Ecology
18 covenants not to institute further legal or administrative actions against Defendant regarding
19 matters within the scope of this Decree. This covenant is limited in its application to the sites
20 described in Section 2 of this Decree and to the types and maximum concentrations of
21 hazardous substances that are on site at the time this Decree is entered, and are described in
22 Section 3.2 of the Thea Foss Redevelopment Cleanup Action Plan, attached as Exhibit C. This
23 covenant is not applicable to any other area, substances, or concentrations of substances. This
24 covenant is contingent upon Defendant's compliance with all terms and conditions of this
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1 Decree. This covenant does not affect Ecology’s right to seek recovery for natural resource
2 damages.

3 A. Reopeners: Notwithstanding the covenant given above, Ecology reserves the
4 right to institute legal or administrative actions against a Defendant seeking to require them to
5 perform additional response actions at a site under this Decree, and to pursue appropriate cost
6 recovery in accordance with provisions set out in RCW 70.105D.050, under the following
7 circumstances:

- 8 (1) If Defendants fail to meet the requirements of this Decree, including, but
9 not limited to, failure of the remedial action to meet the cleanup
10 standards identified in the Thea Foss Redevelopment Cleanup Action
11 Plan (Exhibit C) and the SCAP for that site;
- 12 (2) Upon Ecology’s determination that action beyond the terms of this
13 Decree is necessary to abate an imminent and substantial endangerment
14 to public health or welfare or the environment;
- 15 (3) In the event new information becomes available regarding factors
16 previously unknown to Ecology, including the nature or quantity of
17 hazardous substances at the Site, and Ecology determines, in light of this
18 information, that further remedial action is necessary at the Site to
19 protect human health or the environment, and Defendants, after notice,
20 fail to take the necessary action within a reasonable time;
- 21 (4) In the event the assumptions upon which the cleanup remedies agreed to
22 in the Thea Foss Redevelopment Cleanup Action Plan and the SCAP for
23 the site were based do not prove to be true or accurate;

1 (5) In the event the remedial action conducted at the Site fails to meet the
2 requirements set forth in the Thea Foss Redevelopment Cleanup Action
3 Plan and the SCAP for the site; and

4 (6) In the event more stringent or different cleanup standards or other
5 regulatory requirements regarding remedial action Under MTCA are
6 adopted by the Washington State Legislature or by Ecology if it
7 determines that applying the new standards to a particular site is
8 necessary to protect human health or the environment.

9 Further, if factors or conditions at the site, previously unknown to Ecology, are
10 discovered after entry of this Decree, and these unknown factors or conditions indicate that the
11 remedial action is not protective of the public health, or welfare, or the environment, or present
12 a previously unknown threat to human health or the environment, Ecology also reserves the
13 right to request the court to amend this covenant not to sue as required by RCW
14 70.105D.040(4)(c).

15 B. Applicability: The Covenant Not to Sue set forth above shall have no
16 applicability whatsoever to

- 17 (1) Criminal liability;
- 18 (2) Liability for damages to natural resources;
- 19 (3) Any Ecology action against potentially liable parties not party to this
20 Decree;
- 21 (4) Groundwater contamination that may exist at any of the property
22 covered under Section 2.A that requires active remediation;
- 23 (5) Property covered under Section 2.A on which Defendant does not fully
24 implement all remedial actions under this Decree, including a SCAP;
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1 (6) Any portion of a site between the mean high water mark and the low
2 water mark.

3 **30. EFFECTIVE DATE**

4 This Decree was originally effective on October 17, 1994, the date it was entered by the
5 Court. The “Consent Decree – First Comprehensive Amendment” is effective on the date it is
6 entered by the Court.

7 **31. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

8 This Decree has been the subject of public notice and comment under RCW
9 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to
10 a more expeditious cleanup of hazardous substances at the site.

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

5 DATED this _____ day of _____, 2002.

6
7 _____
8 JUDGE/COMMISSIONER
9 Pierce County Superior Court

10 DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

11
12 _____
13 JAMES PENDOWSKI
14 Program Manager
15 Toxics Cleanup Program
16 Date: _____

17 _____
18 STEVEN J. THIELE, WSBA #20275
19 Assistant Attorney General
20 Attorneys for Plaintiff
21 Department of Ecology
22 Date: _____

16 CITY OF TACOMA

17
18 By: _____
19 Date: _____
20 Name: _____
21 Title: _____

22 _____
23 DOUGLAS F. MOSICH, WSBA #18341
24 Attorney for City of Tacoma
25 Date: _____

21 FOSS WATERWAY DEVELOPMENT
22 AUTHORITY

PRESTON GATES & ELLIS LLP

23 _____
24 DONALD G. MEYER
25 Executive Director
26 Date: _____

27 _____
28 KIRK A. LILLEY, WSBA #20369
29 Attorneys for Foss Waterway
30 Development Authority
31 Date: _____

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