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STATE OF WASHINGTON
SKAGIT COUNTY SUPERIOR COURT

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

PORT OF ANACORTES, a Washington
municipal corporation; and KIMBERLY-
CLARK CORPORATION, a Delaware
corporation,

Defendants.

NO. 09 2 01247 7

CONSENT DECREE

30

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1 facts; provided, however, that the Port and K-C shall not challenge the authority of the Attorney
2 General and Ecology to enforce this Decree.

3 F. The Court is fully advised of the reasons for entry of this Decree, and good cause
4 having been shown:

5 Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

6 **II. JURISDICTION**

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

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

14 C. Ecology has determined that a release or threatened release of hazardous
15 substances has occurred at the Site that is the subject of this Decree, including a release of
16 hazardous substances that has led to NRD.

17 D. Ecology has given notice to the Port and K-C of Ecology's determination that
18 they are PLPs for the Site, as required by RCW 70.105D.020(21) and WAC 173-340-500.

19 E. The actions to be taken pursuant to this Decree are necessary to protect public
20 health and the environment and to restore natural resources.

21 F. This Decree has been subject to public notice and comment and public hearings
22 were held on March 17, 2009.

23 G. Ecology finds that this Decree will lead to a more expeditious cleanup of
24 hazardous substances at the Site in compliance with the cleanup standards established under
25 RCW 70.105D.030(2)(e) and Chapter 173-340 WAC, and to a more expeditious restoration of
26 natural resources.

1 H. PLPs have agreed to undertake the actions specified in this Decree and consents to
2 the entry of this Decree under MTCA.

3 **III. PARTIES BOUND**

4 This Decree shall apply to and be binding upon the Parties to this Decree, their successors
5 and assigns. The undersigned representative of each party hereby certifies that he or she is fully
6 authorized to enter into this Decree and to execute and legally bind such party to comply with this
7 Decree. PLPs agree to undertake all actions required by the terms and conditions of this Decree.
8 No change in ownership or corporate status shall alter PLPs' responsibility under this Decree.
9 PLPs shall provide a copy of this Decree to all agents, contractors, and subcontractors retained to
10 perform work required by this Decree, and shall ensure that all work undertaken by such agents,
11 contractors, and subcontractors complies with this Decree.

12 **IV. DEFINITIONS**

13 Unless otherwise specified herein, all definitions in RCW 70.105D.020 and
14 WAC 173-340-200 shall control the meanings of the terms in this Decree.

15 A. Site: The Site is referred to as the Former Scott Paper Mill Site and is
16 generally located at 15th Street and Q Avenue in Anacortes, Washington. The Site is more
17 particularly described in the Site Diagram (Exhibit A). The Site constitutes a Facility under
18 RCW 70.105D.020(4).

19 B. Parties: Refers to the State of Washington, Department of Ecology, the Port of
20 Anacortes and Kimberly-Clark Corporation.

21 C. PLPs: Refers to the Port and K-C.

22 D. Consent Decree or Decree: Refers to this Consent Decree and each of the exhibits
23 to this Decree. All exhibits are integral and enforceable parts of this Consent Decree. The terms
24 "Consent Decree" or "Decree" shall include all exhibits to this Consent Decree.
25
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1 power and operate equipment. The pulp mill closed in 1978. Scott Paper was acquired by
2 Kimberly-Clark Corporation in December 1995.

3 3. Post-Mill Ownership: In 1978 and 1979, the Port purchased from Scott
4 Paper the Port Uplands Area and most of the adjacent portion of the Marine Area. The
5 MJB North Area and most of the adjacent portion of the Marine Area was purchased by
6 the Snelson-Anvil Corporation in 1979, and has been owned by MJB since 1990.
7 In 2008, the Port acquired the remaining narrow strip of the Marine Area between the Port
8 and MJB properties. In 1999, Sun Healthcare Systems, Inc. (SHS) purchased Parcel 2
9 from the Port, and subsequently subdivided and sold Parcel 2 into four sub-lots. The
10 sub-lots are currently owned by Northwest Educational Service District 189 (ESD 189)
11 and Seafarers LLC.

12 C. Post-Mill Development

13 1. Port Upland Area: In 1990, the Port constructed a log storage facility on
14 Parcels 1 and 2. The log storage yard was in operation through 1993. As part of the log
15 storage yard construction, approximately 30,000 cubic yards (cy) of wood debris were
16 removed from the west side of Parcel 1 and the excavations reportedly backfilled with
17 dredged materials obtained from the 1968 U.S. Army Corps of Engineers (USACE)
18 expansion and dredging of the Cap Sante Marina. In 1994, an additional 100,000 cy of
19 dredged sand from the Swinomish Channel was delivered by the USACE and used as
20 geotechnical preload to support redevelopment of the Port Uplands Area. Construction of
21 Seafarers' Memorial Park on Parcel 3 began in 1995. In 2000, SHS developed a
22 campus/office park on the southeast portion of Parcel 2. In 2001/2002 a retail (health
23 club) building was developed in the southwest corner of Parcel 2, and in 2007 a mixed use
24 retail/office building was developed on the northwest portion of Parcel 2.

25 2. MJB North Area: Since 1982, the MJB North Area has been used for light
26 industrial operations. In about 1982, the Snelson-Anvil Corporation reportedly removed

1 wood debris and soft soils from much of the MJB North Area and backfilled the
2 excavations with imported granular fill, particularly in areas where heavy site operation
3 loads were planned. Portions of the MJB North Area, particularly in areas close to the
4 shoreline, have not been significantly excavated since the time of the mill operations.

5 D. Previous Remedial Actions and Investigations

6 1. Port Uplands Area Remedial Actions: In 1999, as part of the
7 development of the SHS office park, a remedial action was performed at Parcel 2
8 under the MTCA Voluntary Cleanup Program (VCP). The remedial action included,
9 among other elements, removal and off-site landfill disposal of 3,469 tons of petroleum-
10 contaminated soil (excavation areas are depicted in Figure 2), soil capping, and
11 institutional controls to prevent future exposure to subsurface soil at the property and to
12 restrict groundwater use for drinking water. Work also included the installation of a sheet
13 pile wall along the shoreline for containment of residual contaminated soil, concurrently
14 providing structural foundation support for the building constructed by SHS (currently
15 owned and occupied by ESD 189).

16 2. Marine Area Remedial Actions: Storm-generated wave and current action
17 has resulted in significant erosion at the shoreline since at least 1962, which has
18 contributed to contaminant transport from the uplands to the Marine Area. In February
19 2005, the Port completed a Bank Stabilization Interim Action along the Seafarers'
20 Memorial Park shoreline by placing large rip-rap along the shoreline.

21 E. Remedial Investigation and Feasibility Study

22 1. On March 24, 2003, the Port and Ecology entered into a Consent
23 Decree which required the Port, among other things, to conduct a Remedial
24 Investigation/Feasibility Study (RI/FS) for the northern portion of the Site.

25 2. On January 27, 2005, Ecology and K-C entered into an Agreed Order
26 which required K-C to perform an RI/FS for the southern portion of the Site.

- 1 ○ Soil between 0 to 6 feet BGS in remaining areas of the Port Uplands Area
2 containing metals, diesel or motor oil-range hydrocarbons, or PAHs at
3 concentrations exceeding MTCA Method B cleanup levels.
- 4 • Perform confirmation sampling.
 - 5 • Transport contaminated soils to appropriate disposal facility.
 - 6 • Backfill excavations with clean imported fill and restore original Site
7 topography, features, and surfaces.
 - 8 • Develop environmental covenants to address remaining contaminated soil left
9 in place below 6 feet BGS across the remainder of the Port Uplands Area.
 - 10 • Install a monitoring well network and implement long groundwater
11 monitoring.

12 2. MJB North Uplands Interior Area

- 13 • Removal of shallow soil (0 to 6 feet BGS) with contaminant concentrations
14 that exceed MTCA Method B cleanup levels throughout the upland area.
- 15 • Characterize and dispose of excavated contaminated soils at an appropriate
16 facility.
- 17 • Perform confirmation sampling.
- 18 • Backfill excavations with clean imported fill.
- 19 • Develop environmental covenants to address remaining contaminated soils left
20 in place below 6 feet BGS across the remainder of the MJB North Area.
- 21 • Install a monitoring well network and implement long term groundwater
22 monitoring.

23 3. Shoreline Buffer Zone

- 24 • Excavate contaminated soils and overburden from certain areas across the Site
25 (including areas on both the Port and MJB properties) located within the
26

1 shoreline buffer zone (defined as within 75 feet west of mean high-high level
2 water mark elevation) including:

- 3 ○ Soils between 0 to 10 feet containing metals, diesel-range and oil-range
4 petroleum hydrocarbons, PAHs, and PCBs exceeding Method B cleanup
5 levels (0 to 6 feet below ground surface) and/or remediation levels
6 specified in the CAP, Exhibit B, (0 to 10 feet below ground surface).
- 7 ○ Transport contaminated soils to an appropriate disposal facility.
- 8 ○ Backfill excavations with clean imported fill and/or clean overburden soils
9 (as appropriate) and restore original Site topography, features, and
10 surfaces.
- 11 ○ Develop environmental covenants to address remaining contaminated soils
12 left in place below 10-feet along the shoreline buffer zone.
- 13 ○ Install a monitoring wells network and implement long term groundwater
14 monitoring.

15 4. Marine Area

- 16 ● Remove wood debris and contaminants in the Marine Area through dredging,
17 off-site disposal, and placement of a sediment cap or backfill material
18 including the following;
 - 19 ○ Dredge and backfill selected subtidal areas a minimum of 2-feet.
 - 20 ○ Dredge and cap selected intertidal and nearshore areas a minimum of
21 2-feet.
 - 22 ○ Place a thin layer cap in selected subtidal areas.
 - 23 ● Protect nearshore and upland area from erosion by performing the following:
 - 24 ○ Stabilize selected nearshore areas with gravel and quarry spall like
25 materials.
- 26

- Construct off-shore wave attenuation structures to prevent future releases of remaining buried contaminated soil in the shoreline buffer zone and contained under shoreline caps.
- Plant eelgrass to reduce migration of sediment down shore.

and

5. Implement certain NRD restoration projects and funding. Exhibit C describes the restoration projects and funding for this Site.

B. PLPs agree not to perform any remedial actions outside the scope of this Decree unless the Parties agree to modify the Scope of Work as stated above in paragraph A and Schedule (Exhibit B) to cover these actions. All work conducted by PLPs under this Decree shall be done in accordance with Chapters 173-340 and 173-204 WAC unless otherwise provided herein.

VII. DESIGNATED PROJECT COORDINATORS

The project coordinator for Ecology is:

Sandra Caldwell
Toxics Cleanup Program
PO Box 47600
Olympia, WA 98504-7600
(360) 407-7209
E-mail: saca461@ecy.wa.gov

The project coordinator for PLPs are:

K-C
Tony Fedel
Kimberly-Clark Corporation
1400 Holcomb Bridge Road
Roswell, GA 30076-8785
(770) 587-7093

The Port
Becky Darden
Port of Anacortes
P.O. Box 297
Anacortes, WA 98221
(360) 299-1818

1 Each project coordinator shall be responsible for overseeing the implementation of this
2 Decree. Ecology's project coordinator will be Ecology's designated representative for the Site.
3 To the maximum extent possible, communications between Ecology and PLPs and all documents,
4 including reports, approvals, and other correspondence concerning the activities performed
5 pursuant to the terms and conditions of this Decree shall be directed through the project
6 coordinators. The project coordinators may designate, in writing, working level staff contacts for
7 all or portions of the implementation of the work to be performed required by this Decree.

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

10 **VIII. PERFORMANCE**

11 All geologic and hydrogeologic work performed pursuant to this Decree shall be under the
12 supervision and direction of a geologist licensed in the State of Washington or under the direct
13 supervision of an engineer registered in the State of Washington, except as otherwise provided for
14 by Chapters 18.220 and 18.43 RCW.

15 All engineering work performed pursuant to this Decree shall be under the direct
16 supervision of a professional engineer registered in the State of Washington, except as otherwise
17 provided for by RCW 18.43.130.

18 All construction work performed pursuant to this Decree shall be under the direct
19 supervision of a professional engineer or a qualified technician under the direct supervision of a
20 professional engineer. The professional engineer must be registered in the State of Washington,
21 except as otherwise provided for by RCW 18.43.130.

22 Any documents submitted containing geologic, hydrologic, or engineering work shall be
23 under the seal of an appropriately licensed professional as required by Chapter 18.220 RCW or
24 RCW 18.43.130.

1 PLPs shall notify Ecology in writing of the identity of any engineer(s) and geologist(s),
2 contractor(s) and subcontractor(s), and others to be used in carrying out the terms of this Decree,
3 in advance of their involvement at the Site.

4 IX. ACCESS

5 Ecology or any Ecology authorized representative shall have full authority to enter and
6 freely move about all property at the Site that PLPs either own, control, or have access rights to at
7 all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs, and
8 contracts related to the work being performed pursuant to this Decree; reviewing PLPs' progress
9 in carrying out the terms of this Decree; conducting such tests or collecting such samples as
10 Ecology may deem necessary; using a camera, sound recording, or other documentary type
11 equipment to record work done pursuant to this Decree; and verifying the data submitted to
12 Ecology by PLPs. PLPs shall make all reasonable efforts to secure access rights for those
13 properties within the Site not owned or controlled by PLPs where remedial activities or
14 investigations will be performed pursuant to this Decree. Ecology or any Ecology authorized
15 representative shall give reasonable notice before entering any Site property owned or controlled
16 by PLPs unless an emergency prevents such notice. All parties who access the Site pursuant to
17 this section shall comply with any applicable Health and Safety Plan(s). Ecology employees and
18 their representatives shall not be required to sign any liability release or waiver as a condition of
19 Site property access.

20 X. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY

21 With respect to the implementation of this Decree, PLPs shall make the results of all
22 sampling, laboratory reports, and/or test results generated by it or on its behalf concerning this
23 Decree available to Ecology. Pursuant to WAC 173-340-840(5), all such sampling data shall be
24 submitted to Ecology in both printed and electronic formats in accordance with Section XI
25 (Progress Reports), Ecology's Toxics Cleanup Program Policy 840 (Exhibit F) (Data Submittal
26 Requirements), and/or any subsequent procedures specified by Ecology for data submittal.

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

9 In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be
10 conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to be
11 conducted, unless otherwise approved by Ecology.

12 **XI. PROGRESS REPORTS**

13 PLPs shall submit to Ecology written monthly Progress Reports that describe the actions
14 taken during the previous month to implement the requirements of this Decree. The Progress
15 Reports shall include the following:

16 A. A list of on-site activities that have taken place during the month;

17 B. Detailed description of any deviations from required tasks not otherwise
18 documented in project plans or amendment requests;

19 C. Description of all deviations from the Scope of Work (Work to be Performed,
20 Section VI) and Schedule (Exhibit D) during the current month and any planned deviations in the
21 upcoming month;

22 D. For any deviations in schedule, a plan for recovering lost time and maintaining
23 compliance with the schedule;

24 E. All raw data (including laboratory analyses) received by PLPs during the past
25 month and an identification of the source of the sample; and

26 F. A list of deliverables for the upcoming month if different from the schedule.

1 All Progress Reports shall be submitted by the tenth (10th) day of the month in which they
2 are due after the effective date of this Decree. Unless otherwise specified, Progress Reports and
3 any other documents submitted pursuant to this Decree shall be sent by certified mail, return
4 receipt requested, to Ecology's project coordinator.

5 **XII. RETENTION OF RECORDS**

6 During the pendency of this Decree, and for ten (10) years from the date this Decree is no
7 longer in effect as provided in Section XXIX (Duration of Decree), PLPs shall preserve all
8 records, reports, documents, and underlying data in its possession relevant to the implementation
9 of this Decree and shall insert a similar record retention requirement into all contracts with project
10 contractors and subcontractors. Upon request of Ecology, PLPs shall make all non-privileged
11 records available to Ecology and allow access for review within a reasonable time.

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

13 No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest
14 in any portion of the Site shall be consummated by PLPs without provision for continued
15 operation and maintenance of any containment system, treatment system, and/or monitoring
16 system installed or implemented pursuant to this Decree.

17 Prior to PLPs' transfer of any interest in all or any portion of the Site, and during the
18 effective period of this Decree, PLPs shall provide a copy of this Decree to any prospective
19 purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty (30)
20 days prior to any transfer, PLPs shall notify Ecology of said transfer. Upon transfer of any
21 interest, PLPs shall restrict uses and activities to those consistent with this Consent Decree and
22 notify all transferees of the restrictions on the use of the property.

23 **XIV. RESOLUTION OF DISPUTES**

24 A. In the event a dispute arises as to an approval, disapproval, proposed change, or
25 other decision or action by Ecology's project coordinator, or an itemized billing statement under
26

1 Section XXV (Remedial Action Costs), the Parties shall utilize the dispute resolution procedure
2 set forth below.

3 1. Upon receipt of Ecology's project coordinator's written decision, or the
4 itemized billing statement, PLPs have fourteen (14) days within which to notify Ecology's
5 project coordinator in writing of its objection to the decision or itemized statement.

6 2. The Parties' project coordinators shall then confer in an effort to resolve
7 the dispute. If the project coordinators cannot resolve the dispute within fourteen
8 (14) days, Ecology's project coordinator shall issue a written decision.

9 3. PLPs may then request regional management review of the decision. This
10 request shall be submitted in writing to the Land and Aquatic Lands Cleanup Section,
11 Toxics Cleanup Program Section Manager within seven (7) days of receipt of Ecology's
12 project coordinator's written decision.

13 4. Ecology's Land and Aquatic Lands Cleanup Section Manager shall
14 conduct a review of the dispute and shall endeavor to issue a written decision regarding
15 the dispute within thirty (30) days of PLPs' request for review.

16 5. If PLPs find Ecology's Land and Aquatic Lands Cleanup Section
17 Manager's decision unacceptable, PLPs may then request final management review of the
18 decision. This request shall be submitted in writing to the Toxics Cleanup Program
19 Manager within seven (7) days of receipt of the Land and Aquatic Lands Cleanup Section
20 Manager's decision.

21 6. Ecology's Toxics Cleanup Program Manager shall conduct a review of
22 the dispute and shall endeavor to issue a written decision regarding the dispute
23 within thirty (30) days of PLPs' request for review of the Regional Section Manager's
24 decision. The Toxics Cleanup Program Manager's decision shall be Ecology's final
25 decision on the disputed matter.
26

1 B. If Ecology's final written decision is unacceptable to PLPs, PLPs have the right to
2 submit the dispute to the Court for resolution. The Parties agree that one judge should retain
3 jurisdiction over this case and shall, as necessary, resolve any dispute arising under this Decree.
4 In the event PLPs present an issue to the Court for review, the Court shall review the action or
5 decision of Ecology on the basis of whether such action or decision was arbitrary and capricious
6 and render a decision based on such standard of review.

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

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

14 **XV. AMENDMENT OF DECREE**

15 The project coordinators may agree to minor changes to the work to be performed without
16 formally amending this Decree. Minor changes will be documented in writing by Ecology.

17 Substantial changes to the work to be performed shall require formal amendment of this
18 Decree. This Decree may only be formally amended by a written stipulation among the Parties
19 that is entered by the Court, or by order of the Court. Such amendment shall become effective
20 upon entry by the Court. Agreement to amend the Decree shall not be unreasonably withheld by
21 any party.

22 PLPs shall submit a written request for amendment to Ecology for approval. Ecology
23 shall indicate its approval or disapproval in writing and in a timely manner after the written
24 request for amendment is received. If the amendment to the Decree is a substantial change,
25 Ecology will provide public notice and opportunity for comment. Reasons for the disapproval of
26 a proposed amendment to the Decree shall be stated in writing. If Ecology does not agree to a

1 proposed amendment, the disagreement may be addressed through the dispute resolution
2 procedures described in Section XIV (Resolution of Disputes).

3 **XVI. EXTENSION OF SCHEDULE**

4 A. An extension of schedule shall be granted only when a request for an extension is
5 submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline
6 for which the extension is requested, and good cause exists for granting the extension. All
7 extensions shall be requested in writing. The request shall specify:

- 8 1. The deadline that is sought to be extended;
- 9 2. The length of the extension sought;
- 10 3. The reason(s) for the extension; and
- 11 4. Any related deadline or schedule that would be affected if the extension
12 were granted.

13 B. The burden shall be on PLPs to demonstrate to the satisfaction of Ecology that the
14 request for such extension has been submitted in a timely fashion and that good cause exists for
15 granting the extension. Good cause may include, but may not be limited to:

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

23 However, neither increased costs of performance of the terms of this Decree nor
24 changed economic circumstances shall be considered circumstances beyond the reasonable
25 control of PLPs.

1 C. Ecology shall act upon any written request for extension in a timely fashion.
2 Ecology shall give PLPs written notification of any extensions granted pursuant to this Decree.
3 A requested extension shall not be effective until approved by Ecology or, if required, by the
4 Court. Unless the extension is a substantial change, it shall not be necessary to amend this Decree
5 pursuant to Section XV (Amendment of Decree) when a schedule extension is granted.

6 D. An extension shall only be granted for such period of time as Ecology determines
7 is reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety
8 (90) days only as a result of:

- 9 1. Delays in the issuance of a necessary permit which was applied for in a
10 timely manner;
- 11 2. Other circumstances deemed exceptional or extraordinary by Ecology; or
- 12 3. Endangerment as described in Section XVII (Endangerment).

13 XVII. ENDANGERMENT

14 In the event Ecology determines that any activity being performed at the Site is creating or
15 has the potential to create a danger to human health or the environment, Ecology may direct PLPs
16 to cease such activities for such period of time as it deems necessary to abate the danger. PLPs
17 shall immediately comply with such direction. In such a case, the PLPs shall not be subject to
18 any enforcement action for stopping or delaying implementation of this Decree.

19 In the event PLPs determine that any activity being performed at the Site is creating or has
20 the potential to create a danger to human health or the environment, PLPs may cease such
21 activities. PLPs shall notify Ecology's project coordinator as soon as possible, but no later than
22 twenty-four (24) hours after making such determination or ceasing such activities. Upon
23 Ecology's direction, PLPs shall provide Ecology with documentation of the basis for the
24 determination or cessation of such activities. If Ecology disagrees with PLPs' cessation of
25 activities, it may direct PLPs to resume such activities.

1 If Ecology concurs with or orders a work stoppage pursuant to this section, PLPs'
2 obligations with respect to the ceased activities shall be suspended until Ecology determines the
3 danger is abated, and the time for performance of such activities, as well as the time for any other
4 work dependent upon such activities, shall be extended, in accordance with Section XVI
5 (Extension of Schedule), for such period of time as Ecology determines is reasonable under the
6 circumstances. In such a case, the PLPs shall not be subject to any enforcement action for
7 stopping or delaying implementation of this Decree.

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

10 XVIII. NATURAL RESOURCE DAMAGES

11 A. In addition to implementing the final cleanup remedy for the Site, the CAP
12 (Exhibit B) is designed to restore Site soils and sediments and the resources and services they
13 support. This will help restore natural resources and prevent future damages to resources at the
14 Site. The Port has also restored natural resources and reduced future damages at the Site through
15 two prior remedial actions performed at the Site that addressed Parcel 2 contaminated soils and
16 stabilized the Site shoreline to prevent further erosion of contaminated soils into the Site's aquatic
17 area. This Decree provides for further restoration of natural resources at the Site and elsewhere in
18 Fidalgo Bay through the restoration actions are described in Exhibit C, which is an integral and
19 enforceable part of this Decree. Also, the final cleanup action has been designed both to address
20 the contamination at the Site and to coincidentally provide a favorable platform for natural
21 resource restoration activities. This section requires the actions described in Exhibit C to be taken
22 to restore and/or compensate fully for the NRD injuries at the Site.

23 B. Release of Claims: In consideration of the PLPs' compliance with the terms and
24 conditions of this section and this Decree, the State of Washington, through the Department of
25 Ecology and the Attorney General, hereby release all claims against the PLPs relating to NRD
26 injuries resulting from the release or threatened release of hazardous substances covered by this

1 Decree, including but not limited to claims under Chapters 70.105D, 90.48, and 90.56 RCW,
2 federal law, and common law relating to NRD injuries occurring on or off the Site.

3 **XIX. COVENANT NOT TO SUE**

4 A. Covenant Not to Sue: In consideration of PLPs' compliance with the terms
5 and conditions of this Decree, Ecology covenants not to institute legal or administrative
6 actions against PLPs regarding the release or threatened release of hazardous substances covered
7 by this Decree.

8 This Decree covers only the Site specifically identified in the Site Diagram (Exhibit A)
9 and those hazardous substances that Ecology knows are located at the Site as of the date of entry
10 of this Decree. This Decree does not cover any other hazardous substance or area. Ecology
11 retains all of its authority relative to any substance or area not covered by this Decree.

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

- 13 1. Criminal liability; and
14 2. Any Ecology action, including cost recovery, against PLPs not a party to
15 this Decree.

16 If factors not known at the time of entry of the settlement agreement are discovered and
17 present a previously unknown threat to human health or the environment, the Court shall amend
18 this Covenant Not to Sue.

19 B. Reopeners: As required by RCW 70.105D.040(3)(c), Ecology specifically
20 reserves the right to institute legal or administrative action against PLPs to require it to perform
21 additional remedial actions at the Site or natural resource restoration actions and to pursue
22 appropriate cost recovery, pursuant to RCW 70.105D.050, under the following circumstances:

- 23 1. Upon PLPs' failure to meet the requirements of this Decree, including, but
24 not limited to, failure of the PLPs to fulfill the obligations set forth in Section XVIII
25 (Natural Resource Damages) or failure of the remedial action to meet the cleanup
26 standards identified in the CAP (Exhibit B);

1 2. Upon Ecology's determination that remedial action beyond the terms of
2 this Decree is necessary to abate an imminent and substantial endangerment to human
3 health or the environment;

4 3. Upon the availability of new information regarding factors previously
5 unknown to Ecology, including the nature or quantity of hazardous substances at the Site,
6 and Ecology's determination, in light of this information, that further natural resource
7 restoration actions or further remedial action is necessary at the Site to protect human
8 health or the environment; or

9 4. Upon Ecology's determination that additional remedial actions are
10 necessary to achieve cleanup standards within the reasonable restoration time frame set
11 forth in the CAP.

12 C. Except in the case of an emergency, prior to instituting legal or administrative
13 action against PLPs pursuant to this section, Ecology shall provide PLPs with fifteen (15)
14 calendar days notice of such action.

15 **XX. CONTRIBUTION PROTECTION**

16 With regard to claims for contribution against PLPs, the Parties agree that PLPs are
17 entitled to protection against claims for contribution for matters addressed in this Decree as
18 provided by RCW 70.105D.040(4)(d).

19 **XXI. LAND USE RESTRICTIONS**

20 PLPs shall record a Restrictive Covenant using the Model Restrictive Covenant in
21 Exhibit G to the site specific requirements with the office of the Skagit County Auditor within ten
22 (10) days of the completion of the remedial action. The Restrictive Covenant shall restrict future
23 uses of the Site. PLPs shall provide Ecology with a copy of the recorded Restrictive Covenant
24 within thirty (30) days of the recording date.

1 **XXII. FINANCIAL ASSURANCES**

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

6 Within sixty (60) days of the effective date of this Decree, PLPs shall submit to Ecology
7 for review and approval an estimate of the costs that it will incur in carrying out the terms of this
8 Decree, including operation and maintenance, and compliance monitoring. Within sixty (60)
9 days after Ecology approves the aforementioned cost estimate, PLPs shall provide proof of
10 financial assurances sufficient to cover all such costs in a form acceptable to Ecology.

11 PLPs shall adjust the financial assurance coverage and provide Ecology's project
12 coordinator with documentation of the updated financial assurance for:

13 A. Inflation, annually, within thirty (30) days of the anniversary date of the entry of
14 this Decree; or if applicable, the modified anniversary date established in accordance with this
15 Section, or if applicable, ninety (90) days after the close of PLPs' fiscal year if the financial test or
16 corporate guarantee is used; and

17 B. Changes in cost estimates, within thirty (30) days of issuance of Ecology's
18 approval of a modification or revision to the CAP that result in increases to the cost or expected
19 duration of remedial actions. Any adjustments for inflation since the most recent preceding
20 anniversary date shall be made concurrent with adjustments for changes in cost estimates. The
21 issuance of Ecology's approval of a revised or modified CAP will revise the anniversary date
22 established under this Section to become the date of issuance of such revised or modified CAP.

23 **XXIII. INDEMNIFICATION**

24 Each individual PLP agrees to indemnify and save and hold the State of Washington, its
25 employees, and agents harmless from any and all claims or causes of action for death or injuries
26 to persons or for loss or damage to property to the extent arising from or on account of negligent

1 acts or omissions of such individual PLP, its officers, employees, agents, or contractors in
2 entering into and implementing this Decree. However, PLPs shall not indemnify the State of
3 Washington nor save nor hold its employees and agents harmless from any claims or causes of
4 action to the extent arising out of the negligent acts or omissions of the State of Washington, or
5 the employees or agents of the State, in entering into or implementing this Decree.

6 **XXIV. COMPLIANCE WITH APPLICABLE LAWS**

7 A. All actions carried out by PLPs pursuant to this Decree shall be done in
8 accordance with all applicable federal, state, and local requirements, including requirements to
9 obtain necessary permits, except as provided in RCW 70.105D.090. The Applicable, Relevant
10 and Appropriate Requirements are identified in Exhibit E to this Consent Decree. The permits or
11 other federal, state, or local requirements that the agency has determined are applicable and that
12 are known at the time of entry of this Decree have been identified in the CAP (Exhibit B).

13 B. Pursuant to RCW 70.105D.090(1), PLPs are exempt from the procedural
14 requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws
15 requiring or authorizing local government permits or approvals. However, PLPs shall comply
16 with the substantive requirements of such permits or approvals. The exempt permits or approvals
17 and the applicable substantive requirements of those permits or approvals, as they are known at
18 the time of entry of this Decree, have been identified in the CAP (Exhibit B).

19 PLPs have a continuing obligation to determine whether additional permits or approvals
20 addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under
21 this Decree. In the event either Ecology or PLPs determines that additional permits or approvals
22 addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under
23 this Decree, it shall promptly notify the other party of this determination. Ecology shall
24 determine whether Ecology or PLPs shall be responsible to contact the appropriate state and/or
25 local agencies. If Ecology so requires, PLPs shall promptly consult with the appropriate state
26 and/or local agencies and provide Ecology with written documentation from those agencies of the

1 substantive requirements those agencies believe are applicable to the remedial action. Ecology
2 shall make the final determination on the additional substantive requirements that must be met
3 by PLPs and on how PLPs must meet those requirements. Ecology shall inform PLPs in
4 writing of these requirements. Once established by Ecology, the additional requirements shall be
5 enforceable requirements of this Decree. PLPs shall not begin or continue the remedial action
6 potentially subject to the additional requirements until Ecology makes its final determination.

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

13 **XXV. REMEDIAL ACTION COSTS**

14 PLPs shall pay to Ecology costs incurred by Ecology pursuant to this Decree and
15 consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or
16 its contractors for, or on, the Site under Chapter 70.105D RCW, including remedial actions and
17 Decree preparation, negotiation, oversight, and administration. These costs shall include work
18 performed both prior to and subsequent to the entry of this Decree. Ecology's costs shall include
19 costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2).
20 PLPs shall pay the required amount, except for those costs that the PLPs dispute, within thirty
21 (30) days of receiving from Ecology an itemized statement of costs that includes a summary of
22 costs incurred, an identification of involved staff, and the amount of time spent by involved staff
23 members on the project. A general statement of work performed will be provided upon request.
24 Itemized statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay
25 Ecology's costs, other than disputed costs, within thirty (30) days of receipt of the itemized
26 statement of costs will result in interest charges at the rate of twelve percent (12%) per annum,

1 compounded monthly. PLPs shall pay any disputed costs that remain after completion of the
2 dispute resolution process set forth above within ninety (30) days of final decision by Ecology.

3 Pursuant to RCW 70.105D.055, Ecology has authority to recover unreimbursed remedial
4 action costs by filing a lien against real property subject to the remedial actions.

5 **XXVI. IMPLEMENTATION OF REMEDIAL ACTION**

6 If Ecology determines that PLPs have failed without good cause to implement the
7 remedial action, in whole or in part, Ecology may, after notice to PLPs, perform any or all
8 portions of the remedial action that remain incomplete. If Ecology performs all or portions of the
9 remedial action because of PLPs' failure to comply with its obligations under this Decree, PLPs
10 shall reimburse Ecology for the costs of doing such work in accordance with Section XXV
11 (Remedial Action Costs), provided that PLPs are not obligated under this section to reimburse
12 Ecology for costs incurred for work inconsistent with or beyond the scope of this Decree.

13 Except where necessary to abate an emergency situation, PLPs shall not perform any
14 remedial actions at the Site outside those remedial actions required by this Decree, unless
15 Ecology concurs, in writing, with such additional remedial actions pursuant to Section XV
16 (Amendment of Decree).

17 **XXVII. PERIODIC REVIEW**

18 As remedial action, including groundwater monitoring, continues at the Site, the Parties
19 agree to review the progress of remedial action at the Site, and to review the data accumulated as
20 a result of monitoring the Site as often as is necessary and appropriate under the circumstances.
21 At least every five (5) years after the initiation of cleanup action at the Site the Parties shall meet
22 to discuss the status of the Site and the need, if any, for further remedial action at the Site. At
23 least ninety (90) days prior to each periodic review, PLPs shall submit a report to Ecology that
24 documents whether human health and the environment are being protected based on the factors
25 set forth in WAC 173-340-420(4). Ecology reserves the right to require further remedial action
26

1 at the Site under appropriate circumstances. This provision shall remain in effect for the duration
2 of this Decree.

3 **XXVIII. PUBLIC PARTICIPATION**

4 A Public Participation Plan (Exhibit H) is required for this Site. Ecology shall maintain
5 the responsibility for public participation at the Site. However, PLPs shall cooperate with
6 Ecology, and shall:

7 A. If agreed to by Ecology, develop an appropriate mailing list and prepare drafts of
8 public notices and fact sheets at important stages of the remedial action, such as the submission of
9 work plans, remedial investigation/feasibility study reports, cleanup action plans, and engineering
10 design reports. As appropriate, Ecology will edit, finalize, and distribute such fact sheets and
11 prepare and distribute public notices of Ecology's presentations and meetings.

12 B. Notify Ecology's project coordinator prior to the preparation of all press releases
13 and fact sheets, and before major meetings with the interested public and local governments
14 concerning this Decree. Likewise, Ecology shall notify PLPs prior to the issuance of all press
15 releases and fact sheets, and before major meetings with the interested public and local
16 governments concerning this Decree. For all press releases, fact sheets, meetings, and other
17 outreach efforts by PLPs concerning this Decree that do not receive prior Ecology approval, PLPs
18 shall clearly indicate to its audience that the press release, fact sheet, meeting, or other outreach
19 effort was not sponsored or endorsed by Ecology.

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

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

- 25 1. Anacortes Public Library
26 1220 10th Street
Anacortes, WA 98221

