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

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

CITY OF TACOMA; and FOSS
WATERWAY DEVELOPMENT
AUTHORITY

Defendants.

NO. 94-2-10917-6

FIFTH AMENDMENT TO CONSENT
DECREE TO INCLUDE THE SITE-
SPECIFIC CLEANUP ACTION PLAN
FOR PARCEL 10 AND THE 21ST
STREET RIGHT-OF-WAY SITE

Pursuant to Sections 7 and 17 of the First Comprehensive Amendment to the Consent Decree (hereinafter Decree), the undersigned hereby agree to entry by the Court of this Amendment to the Decree. The Decree is amended as follows, and in all other respects remains unchanged.

1. A portion of Parcel 10 is owned by the Foss Waterway Development Authority (FWDA). It is denominated as Harmon Cabinets in the Decree, and is depicted as such on the Map of Potential Cleanup Sites attached as Exhibit A to the Decree. The FWDA's ownership of Parcel 10 does not include that portion of Parcel 10 dedicated to a Public Esplanade. The Public Esplanade portion of Parcel 10 is owned by the City of Tacoma. The legal description corresponding to FWDA's ownership of Parcel 10 is included in Appendix A to this Amendment.

1 2. In addition to owning the Public Esplanade portion of Parcel 10, the City of
2 Tacoma also owns the 21st Street Right-of-Way. The legal descriptions for the Public Esplanade
3 portion of Parcel 10 and the 21st Street Right-of-Way are included in Appendix B of this
4 Amendment.

5 3. In accordance with Section 17 of the Decree, the Decree is amended to include
6 the Site-Specific Cleanup Action Plan (SCAP) for the Parcel 10 and 21st Street Right-of-Way
7 Site, attached as Appendix C to this Amendment. This SCAP has been the subject of public
8 notice and comment under RCW 70.105D.040(4)(a). As a result of this process, Ecology has
9 found that implementation of the SCAP will lead to a more expeditious cleanup of hazardous
10 substances at the site.

11 4. In accordance with Section 8 of the Decree, the City and the FWDA shall each
12 record a Restrictive Covenant, and provide Ecology and the Attorney General's Office with
13 written confirmation of such recording, for the portion of the Site that they own, attached hereto
14 as Appendices D and E, respectively, within 90 days of entry of this Amendment. Section 29 of
15 the Decree - the covenant not to sue - shall not apply to this Site until the Restrictive Covenants
16 are recorded.

17 5. In addition to other required institutional controls, the City, on behalf of itself,
18 and the FWDA shall provide financial assurances in accordance with the version of WAC 173-
19 340-440 in effect at the time the City submits its draft remedial design documents to Ecology
20 under Section 7 H of the Decree. The draft remedial design documents submitted to Ecology
21 for approval shall include preliminary cost calculations and financial information describing the
22 basis for the amount and form of financial assurance and a draft financial assurance document.
23 The financial assurance documents shall be treated as a remedial design document under Section
24 7 H. The City shall submit to Ecology as part of the as-built documentation for the site cleanup,
25 a copy of the financial assurance document and any procedures for periodic adjustment to the
26 value of the financial assurance mechanism.

1 6. The City reserves its right to transfer or assign its responsibility to provide
2 financial assurance to another party in accordance with Section 15 (C) of the Decree provided
3 the transfer or assignment, and the nature of the financial assurance, is consistent with MTCA
4 rules in effect at the time of the transfer or assignment regarding financial assurance and is
5 approved by Ecology prior to such transfer.

6 7. All actions carried out by the Defendant(s) pursuant to the Decree and this
7 Amendment shall be done in accordance with all applicable federal, state, and local
8 requirements, including requirements to obtain necessary permits, except as provided in
9 paragraph 8 of this Amendment.

10 8. Pursuant to RCW 70.105D.090(1), the substantive requirements of chapters
11 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or authorizing
12 local government permits or approvals for the remedial action under the Decree and this
13 Amendment that are known to be applicable at the time of entry of this Amendment have been
14 included in Appendix C, the SCAP, and are binding and enforceable requirements. Defendant(s)
15 has a continuing obligation to determine whether additional permits or approvals addressed in
16 RCW 70.105D.090(1) would otherwise be required for the remedial action under the Decree and
17 this Amendment. In the event either Defendant(s) or Ecology determines that additional permits
18 or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
19 action under the Decree and this Amendment, it shall promptly notify the other party of this
20 determination. Ecology shall determine whether Ecology or Defendant(s) shall be responsible to
21 contact appropriate state and/or local agencies. If Ecology so requires, Defendant(s) shall
22 promptly consult with the appropriate state and/or local agencies and provide Ecology with
23 written documentation from those agencies of the substantive requirements those agencies
24 believe are applicable to the remedial action. Ecology shall make the final determination on the
25 additional substantive requirements that must be met by Defendant(s) and on how Defendant(s)
26 must meet those requirements. Ecology shall inform Defendant(s) in writing of these

1 requirements. Once established by Ecology, the additional requirements shall be enforceable
2 requirements of this Decree. Defendant(s) shall not begin or continue the remedial action
3 potentially subject to the additional requirements until Ecology makes its final determination.
4 Ecology shall ensure that notice and opportunity for comment is provided to the public and
5 appropriate agencies prior to establishing the substantive requirements under this section.

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

12 Being fully advised of the reasons for entry of this Amendment to the Consent Decree
13 and good cause having been shown,

14 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Consent Decree is
15 hereby amended in accordance with the above terms and conditions.

16 DATED this ____ day of _____, 2001.

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18 _____
19 JUDGE/COMMISSIONER
20 Pierce County Superior Court
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1 II IS SO AGREED BY THE UNDERSIGNED:

2 **DEPARTMENT OF ECOLOGY**

**ATTORNEY GENERAL
OF WASHINGTON**

3
4
5 By: _____
6 JAMES PENDOWSKI
Program Manager
Toxics Cleanup Program

By: _____
STEVEN J. THIELE
Assistant Attorney General
WSBA #20275

7 Date: _____

Date: _____

8 **CITY OF TACOMA**

OFFICE OF THE CITY ATTORNEY

9
10
11 By: _____
12 RAY E. CORPUZ, JR.
City Manager

By: _____
DOUGLAS F. MOSICH
Assistant City Attorney
WSBA #18341

13 Date: _____

Date: _____

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19 **FOSS WATERWAY DEVELOPMENT AUTHORITY**

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21
22 By: _____
23 DON MEYER
Executive Director

24 Date: _____

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APPENDIX A

Legal Description Corresponding to the Foss Waterway Development Authority's Portion of Parcel 10

Legal Description

All of Lots 14 through 18 inclusive, Block 58, according to the official MAP OF TACOMA TIDE LANDS filed in the Office of the Commissioner of Public Lands at Olympia, Washington, 3 September 1895. Except the easterly 100 feet of said Lots 14 through 18.

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APPENDIX B

**Legal Descriptions Corresponding to the Public Esplanade Portion of
Parcel 10 and the 21st Street Right-of-Way**

Public Esplanade Portion of Parcel 10

All of Lots 19 through 21 inclusive, Block 58, together with the easterly 100 feet of Lots 14 through 18 inclusive of said Block 58, according to the official MAP OF TACOMA TIDE LANDS filed in the Office of the Commissioner of Public Lands at Olympia, Washington, 3 September 1895.

Subject to the easements described in the Stipulated Judgement and Decree of Appropriation, as amended by Order Amending Description Nunc Pro Tunc filed September 22, 1995 under Pierce County Superior Court Cause No. 94-2-04500-3

Except the area described in the Stipulated Judgement and Decree of Appropriation, as amended by Order Amending Description Nunc Pro Tunc filed September 22, 1995 under Pierce County Superior Court Cause No. 94-2-04500-3

21st Street Right-of-Way

Beginning at the northwest corner of Lot 1, Block 57, MAP OF TACOMA TIDE LANDS, thence North 7°19'58" West, 80.00 feet to the south line of Block 58 said plat; thence along the south line of said Block 58, North 82°40'59" East, 279.96 feet to the Inner Harbor Line of City Waterway; thence along said Harbor Line South 37°39'44" West, 113.10 feet to the northeast corner of Block 57, said plat; thence along the north line of said Block 57 South 82°40'59" West, 200.00 feet to the point of beginning.

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APENDIX C

Parcel 10 and the 21st Street Right-of-Way Site-Specific Cleanup Action Plan

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