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 e-mailed Mase  
 to see if he'll the  
 file for other  
 site names erroneously  
 under Tacoma Redevelopment

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A.M. DEC 30 2003 P.M.

PIERCE COUNTY, WASHINGTON  
 KEVIN STOCK, County Clerk  
 BY \_\_\_\_\_ DEPUTY

STATE OF WASHINGTON  
 PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
 DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

FOSS WATERWAY  
 DEVELOPMENT AUTHORITY

Defendant.

NO.

03 2 14513 6

PROSPECTIVE PURCHASER  
 CONSENT DECREE RE: 2110 EAST  
 D STREET, TACOMA,  
 WASHINGTON

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*American Platting*

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I. INTRODUCTION

This prospective purchaser consent decree ("Decree") is made and entered into by and between the Washington State Department of Ecology ("Ecology") and the Foss Waterway Development Authority ("FWDA"). This Decree refers to the FWDA as "Defendant."

1. WHEREAS, this Decree is to resolve Defendant's potential liability for known and suspected contamination at the 2110 East D Street Property in Tacoma, Washington (the "Site") arising from a release or threatened release of hazardous substances, to promote the public interest by expediting cleanup activities at the Site and to facilitate the cleanup and redevelopment of contaminated properties in Tacoma, Washington.

2. WHEREAS, Exhibit A contains a Site diagram and legal description.

3. WHEREAS, the Site is subject to an EPA consent decree titled, *Thea Foss and Wheeler Osgood Waterways Problem Areas, Commencement Bay Nearshore/Tideflats Superfund Site (CO3-5117RJB)* ("EPA Consent Decree") and issued under the Comprehensive Environmental Response, Compensation and Liability Act. The Site is also subject to an agreement titled, *Settlement and Escrow Agreement for the Thea Foss and Wheeler Osgood Waterway Problem Areas*, signed by the City of Tacoma, other parties to the EPA Consent Decree, and three utility companies (Puget Sound Energy, PacifiCorp, and Advanced Ross Sub Company), which signed a separate consent decree with EPA regarding Waterway cleanup.

4. WHEREAS, Ecology is the lead agency for source control of hazardous substances from upland sites subject to the EPA Consent Decree, pursuant to a September 30, 1989 Record of Decision and a May 1, 1989 Cooperative Agreement with EPA. In that role, Ecology issued a July 19, 1995 letter from Dave Smith, Urban Bay Action Team Supervisor, to Christina Ngo, EPA Region X, concluding that at the time the Site "was not a confirmed source of problem chemicals to the Head of Thea Foss Waterway," based on various Site assessments and sampling. In addition, the EPA Consent Decree states that, "EPA has

1 determined that that adequate source controls are in place to proceed with the remedial action  
2 at the [Thea Foss Waterway Problem Areas],” which includes the Site.

3 5. WHEREAS, Defendant proposes to complete a cleanup of the Site and to  
4 redevelop the Property, together with an adjacent property, for use as a public park and  
5 associated facilities, consistent with development plans for the area, applicable city zoning  
6 provisions, and comprehensive plan designations.

7 6. WHEREAS, Defendant has entered into a contract to acquire the Property.

8 7. WHEREAS, Defendant intends to purchase the Property and to perform the  
9 remedial action outlined in this Consent Decree.

10 8. WHEREAS, in the absence of this Decree, at the time it acquired the Property,  
11 Defendant would incur potential liability under RCW 70.105D.040(1)(a) of the Model Toxics  
12 Control Act (“MTCA”) for performing remedial actions, or for paying remedial costs incurred  
13 by Ecology, resulting from past releases or threatened releases of hazardous substances at the  
14 Site. Defendant certifies that it is not otherwise currently liable under MTCA for remedial  
15 action at the Site.

16 9. WHEREAS, Defendant has developed a Cleanup Action Plan (“CAP”) to  
17 address soil and groundwater contamination at the Site.

18 10. WHEREAS, this Decree promotes the public interest by expediting cleanup  
19 activities at the Site consistent with MTCA, Chapter 70.105D RCW and its implementing rules  
20 in Chapter 173-340 WAC.

21 11. WHEREAS, Defendant shall perform the remediation specified in this Decree  
22 and the CAP, attached as Exhibit B, in exchange for a covenant not to sue and contribution  
23 protection.

24 12. WHEREAS, Defendant’s plans for redeveloping the Property are not likely to  
25 contribute to contamination at the Site, interfere with remedial actions that may be needed on  
26 the Site, or increase human health risks to persons at or in the vicinity of the Site.

1           13.     WHEREAS, this Decree will provide a substantial public benefit by promoting  
2 redevelopment of a former industrial site and yielding substantial new resources to facilitate  
3 cleanup to prevent migration of contaminants to the Thea Foss Waterway and other areas of  
4 the Site.

5           14.     WHEREAS, Defendant's remedial actions will lead to a more expeditious  
6 cleanup of hazardous substances at the Site than would otherwise occur, and will promote  
7 protection of the public health and the environment.

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

14           16.     WHEREAS, the Court is fully advised of the reasons for entry of this Decree,  
15 and good cause having been shown:

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

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

18           17.     This Court has jurisdiction over the subject matter and over the parties pursuant  
19 to MICA, RCW 70.105D. Venue is proper in Pierce County pursuant to RCW  
20 70.105D.050(5)(b).

21           18.     The Washington State Attorney General has the authority, under  
22 RCW 70.105D.040(4)(a) and RCW 70.105D.040(5), to enter into a settlement with persons not  
23 currently liable for remedial actions at a facility who propose to purchase property if, after  
24 public notice, Ecology finds the proposed settlement will lead to a more expeditious cleanup of  
25 hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e).  
26 In addition, the Attorney General may agree to the settlement if the settlement will yield

1 substantial new resources to facilitate cleanup and expedite remedial action consistent with  
2 rules adopted under MICA, and Ecology finds that the redevelopment or reuse of the property  
3 is not likely to contribute to the existing release or threatened release, interfere with remedial  
4 actions that may be needed at the site, or increase health risks to persons at or in the vicinity of  
5 the site. RCW 70.105D.040(4)(b) requires that such a settlement be entered as a consent  
6 decree issued by a court of competent jurisdiction.

7 19. Ecology has determined that hazardous substances have been released at the  
8 Site. Ecology has not determined that Defendant is a PLP for the Site. Defendant has certified  
9 that it is not currently liable under RCW 70.105D. If Defendant acquired an interest in the  
10 Site, however, it could become a PLP as an owner or operator under RCW 70.105D.040(1)(a).  
11 This Decree is entered before Defendant acquires any property interest in the Site or becomes  
12 an operator at the Site, to resolve its potential liability for known or suspected Site  
13 contamination described in reports and in the CAP and to facilitate a more expeditious cleanup  
14 of the Site than otherwise would occur.

15 20. By entering into this Decree, Defendant agrees not to challenge Ecology's  
16 jurisdiction in any proceeding to enforce this Decree. Defendant consents to the issuance of  
17 this Decree and agrees to perform the remedial actions as specified in this Decree.

18 21. All Exhibits attached to this Decree are integral and enforceable parts of this  
19 Decree.

### 20 III. PARTIES BOUND

21 22. This Decree applies to and is binding upon its signatories. The undersigned  
22 representative of each party certifies that he or she is fully authorized to enter into this Decree  
23 and to execute and legally bind the party to comply with this Decree. Defendant agrees to  
24 undertake all actions required by the terms and conditions of this Decree and not to contest  
25 state jurisdiction regarding this Decree. Change in ownership or corporate status does not alter  
26 Defendant's responsibility under this Decree. Defendant must provide a copy of this Decree to

1 all agents, contractors and subcontractors retained to perform work required by this Decree and  
2 must ensure that all work undertaken by such contractors and subcontractors will be in  
3 compliance with this Decree.

4 23. Pursuant to RCW 70.105D.040(4)(e)(ii), Ecology has determined that this  
5 Decree is not based on unique circumstances. The stay of enforcement against successors in  
6 interest in RCW 70.105D.040(4)(e), therefore, applies to this Decree.

#### 7 IV. DEFINITIONS

8 24. Terms used in this Decree that are defined in MTCA (Chapter 70.105D RCW),  
9 or in the MTCA regulations in Chapter 173-340 WAC, have the meaning assigned to them in  
10 those definitions, unless this Decree expressly defines them differently. Whenever terms listed  
11 below are used in this Decree or in its attachments, the following definitions apply:

12 "Decree" means this Decree and all its attachments. The Decree controls if there is a  
13 conflict between the Decree and any Exhibit or attachment.

14 "Paragraph" means a portion of this Decree identified by an Arabic numeral.

15 "Section" means a portion of this Decree identified by a Roman numeral and including  
16 one or more Paragraphs.

17 "Site" means the property located at 2110 East D Street in Tacoma, Washington (the  
18 "Property"), and surrounding areas, if any, where hazardous substances released from the  
19 historic metal plating operations have come to be located. The Site is depicted on Exhibit A.  
20 The Site is a "facility" as defined in MTCA per RCW 70.105D.020(4).

21 "Successors in Interest and Assigns" mean any person who acquires an interest in the  
22 Site through purchase, lease, transfer, assignment, or otherwise.

#### 23 V. STATEMENT OF FACTS

24 25. The Site is located at 2110 East D Street in Tacoma, Washington. It is bounded  
25 to the west by the Thea Foss Waterway. The businesses operating to the north and south of the  
26



1 Site are, respectively, Foss Landing Marina and Berg Scaffolding Company. The Site is  
2 bounded to the east by East D Street.

3 26. The site property has been owned by Lewis R. Jones since 1962. Between 1955  
4 and 1976, the Site was occupied by Puget Sound Plating and Seymour Electroplating. From  
5 1976 to 1986, the Site was occupied by American Plating. All three of these firms performed  
6 metal electroplating, including brass, cadmium, chromium, copper, nickel and zinc plating.  
7 American Plating ceased operation in 1986. No operations are currently being conducted at  
8 the Site.

9 27. Several environmental studies have been performed on the Site. EPA  
10 conducted a preliminary site investigation in March of 1986. In 1988, 1989 and 1994, Applied  
11 Geotechnology, Inc. conducted Phase I and II site investigations and a supplemental ground  
12 water investigation. In 1995, PRC Environmental Management Inc., working under contract to  
13 the EPA, prepared a Comprehensive Groundwater Monitoring Evaluation, which included an  
14 additional groundwater sampling round. The Tacoma-Pierce County Health Department  
15 completed a Site Hazard Assessment in August of 1997. Ecology also conducted sampling as  
16 part of its partial Interim Action Plan cleanup on the site.

17 28. These investigations show that the Site consists of fill of various thickness  
18 overlying unconsolidated silt which ranges from 0 to over 15 feet thick. Beneath the silt is a  
19 deposit of sand, gravel and silt which ranges in thickness from 5 to over 10 feet. The deepest  
20 unit encountered is a dense to very dense silty sand to silty gravel of unknown thickness, which  
21 was encountered approximately 25-30 feet below the surface. This unit was interpreted to be  
22 glacial till. Ground water at the site occurs primarily in the upper fill unit and in the sand,  
23 gravel and silt unit. Depth to groundwater ranges from approximately 5 to 9 feet below ground  
24 surface. Groundwater at the site is in close communication with the marine water in the  
25 adjacent Thea Foss Waterway as evidenced by the significant tidal influence on the onsite  
26 wells and the high salinity in much of the groundwater.

1 29. The investigations found elevated levels of metals associated with electroplating  
2 processes in the Site's soil. Elevated levels of cadmium, copper, lead, cyanide and vinyl  
3 chloride were found on the Site, but the elevated concentrations appeared to be restricted to  
4 fairly shallow soils. Concentrations of these contaminants of concern (COC) were highest in  
5 the immediate vicinity of previous plating operations.

6 30. The investigations also found elevated levels of the copper, nickel and cyanide  
7 in groundwater. The likely sources for these contaminants is leaching from contaminated soils  
8 at the Site. Groundwater is not used as a source of drinking water at the Site or surrounding  
9 properties.

10 31. These environmental conditions were reported as part of an Interim Action Plan  
11 conducted for Ecology by Science Applications International Corporation and submitted on  
12 April 25, 2003.

13 32. In the Spring of 2003, Ecology conducted extensive cleanup activities at the  
14 Site. Part of those activities included demolishing and removing the two buildings that housed  
15 the electroplating lines and chemical storage areas. Due to funding and time constraints,  
16 Ecology's cleanup of the Site was not completed. There are four places remaining on the Site  
17 where the soil designates as Hazardous Waste and requires removal. There is also  
18 approximately 288 yards of cubic yards of contaminated concrete that needs to be removed  
19 from the Site. Finally, five wells currently existing at the site will need to be abandoned.

20 33. Defendant has proposed and Ecology has approved a final remedy as outlined  
21 in the Work to be Performed, Section VII, below and as described more fully in the attached  
22 CAP (Exhibit B).

## 23 VI. DESCRIPTION OF PLANNED PROJECT

24 34. Defendant intends to acquire the Property from the current owner, then, on a  
25 short-term basis, to allow the City of Tacoma to use it during construction of the D Street  
26

1 overpass, while simultaneously allowing for continued access and operation of the Berg  
2 Scaffolding Co business, which operates under a lease of the parcel to the south of the Site.

3 35. Defendant then plans to redevelop the Site as part of a larger development  
4 including the adjacent property to the south to create a public park with parking and ancillary  
5 facilities.

6 **VII. WORK TO BE PERFORMED, SCHEDULE AND LAND USE RESTRICTIONS**

7 36. This Decree contains a program designed to protect public health, welfare, and  
8 the environment from the known, suspected, or threatened release of hazardous substances or  
9 contaminants at, on, or from the Site. The requirements of such program are described in detail  
10 in this section of the Decree and in the Cleanup Action Plan (Exhibit B) and in the schedule in  
11 Exhibit C.

12 37. Defendant agrees to perform the remedial actions described in the CAP and  
13 Schedule to protect human health and the environment from the release or threatened release of  
14 known or suspected hazardous substances at or from the Site.

15 38. Defendant shall perform remedial actions in the attached CAP pursuant to the  
16 Schedule attached at Exhibit C. Defendant, through its contractor(s) and subcontractor(s) as  
17 necessary, shall accomplish the following tasks:

- 18 A. Complete the "Phase 1" cleanup, including constructing temporary  
19 access controls and removing soil and debris that designates as  
20 dangerous waste under WAC 173-303.
- 21 B. Complete the "Phase 2" cleanup, including soil excavation and removal  
22 and capping as established in the CAP.
- 23 C. Conduct groundwater sampling.
- 24 D. Conduct soil compliance monitoring to confirm completion of COC soil  
25 removal  
26

1 E. If soil compliance monitoring results exceed cleanup levels, then  
2 conduct additional excavation and compliance monitoring, or record a  
3 restrictive covenant documenting COC contaminated soils remaining at  
4 Site.

5 Defendant agrees not to perform any remedial actions on the Site that are inconsistent with the  
6 remedial actions required under this Consent Decree.

7 39. Defendant shall obtain any and all state, federal, or local permits required by  
8 applicable law before commencing the remedial action at the Site, except as provided in  
9 Section XXI. Defendant shall prepare a Site Safety and Health Plan in accordance with WAC  
10 173-340-810 and the most recent OSHA, WISHA, Ecology, and EPA guidance and applicable  
11 regulations, for Ecology review. Defendant shall also provide a security system at the Property  
12 designed to prevent entry by unauthorized persons during the excavation work.

13 40. Defendant shall be prohibited from using the Site in a manner likely to cause or  
14 contribute to the existing release, interfering with remedial actions performed or that may be  
15 needed at the Site, or increasing health risks to persons or risks to the environment at or in the  
16 vicinity of the Site.

17 41. Defendant shall record the Restrictive Covenant attached to this Decree as  
18 Exhibit D with the Pierce County Auditor's Office within 30 days of the receipt of soil  
19 excavation clearance sampling data required under this Decree, and shall provide Ecology with  
20 proof of such recording within 30 days of such recording. The Restrictive Covenant will apply  
21 only to that portion of the Property on which hazardous substances are left in concentrations  
22 exceeding cleanup levels. Defendant shall provide Ecology with a copy of the version of the  
23 Restrictive Covenant proposed for filing at least 7 days before actually filing the document.  
24 Defendant, or its Successors in Interest and Assigns, after confirmational monitoring has  
25 shown that contaminants are no longer present at the Property above applicable cleanup levels,  
26 may record an instrument that provides that the Restrictive Covenant provided in Exhibit D

1 shall no longer limit uses of the Property or be of any further force or effect, but only with  
2 Ecology's prior written approval of such instrument.

### 3 VIII. ECOLOGY COSTS

4 42. Defendant agrees to pay costs incurred by Ecology pursuant to this Decree and  
5 consistent with WAC 173-340-550. These costs shall include work performed by Ecology or  
6 its contractors for, or on, the Site under Chapter 70-105D RCW, for investigations, remedial  
7 actions, oversight and administration associated with this Decree (including preparation and  
8 negotiation of this Decree). Ecology costs shall include costs of direct activities and support  
9 costs of direct activities as defined in WAC 173-340-550(2). Defendant agrees to pay the  
10 required amount within 90 days of receiving from Ecology an itemized statement of costs that  
11 includes a summary of costs incurred, an identification of involved staff, and the amount of  
12 time spent by involved staff members on the project. A general statement of work performed  
13 will be provided upon request. Itemized statements and costs shall be prepared quarterly.  
14 Failure to pay Ecology costs within 90 days of receipt of the itemized statement will result in  
15 interest charges as allowed by law. Defendant reserves the right to review and approve any  
16 charges prior to payment. Any dispute regarding remedial and investigation costs for the Site

17 shall be subject to dispute resolution pursuant to Section XIV. Defendant reserves the right to  
18 pay the undisputed portion of an invoice and not pay the disputed portion.

### 19 IX. DESIGNATED PROJECT COORDINATORS

20 43. The project coordinator for Ecology is:

21 Marv Coleman  
22 Inspector/Site Manager  
23 Commencement Bay Program  
24 Department of Ecology  
25 Southwest Regional Office  
26 PO Box 47775  
Olympia, WA 98504-7775  
Telephone: (360) 407-6259  
Fax: (360) 407-6305

1 Email: mcol461@ecy.wa.gov

2 The project coordinator for Defendant is:

3 Don Meyer  
4 Executive Director  
5 Foss Waterway Development Authority  
6 535 East Dock Street, Suite 204  
7 Tacoma, WA 98402  
8 Telephone: (253) 597-8122  
9 Fax: (253) 597-8129  
10 Email: dmeyer@theafoss.com

11 44. Each project coordinator is responsible for overseeing the implementation of  
12 this Decree. The Ecology project coordinator will be Ecology's designated representative at  
13 the Site. To the maximum extent possible, communications between Ecology and Defendant  
14 and all documents, including reports, approvals, and other correspondence concerning the  
15 activities performed pursuant to the terms and conditions of this Decree, shall be directed  
16 through the project coordinators. The project coordinators may designate, in writing, working-  
17 level staff contacts for all or portions of the implementation of the Work to be Performed,  
18 Section VII, and attached Cleanup Action Plan. The project coordinators may agree to minor  
19 modifications to the work to be performed without formal amendments to this Decree.

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

22 **X. PERFORMANCE**

23 46. All work performed pursuant to this Decree shall be under the direction and  
24 supervision, as necessary, of a professional engineer or hydrogeologist, or equivalent, with  
25 experience and expertise in hazardous waste site investigation and cleanup. Any construction  
26 work must be under the supervision of a professional engineer. Defendant shall notify Ecology  
in writing as to the identity of such engineer(s) or hydrogeologist(s), or others and of any

1 contractors and subcontractors to be used in carrying out the terms of this Decree, in advance  
2 of their involvement at the Site.

3 **XI. CERTIFICATION OF DEFENDANT**

4 47. Defendant represents and certifies that, to the best of its knowledge and belief, it  
5 has fully and accurately disclosed to Ecology the information currently in its possession or  
6 control that relates to the environmental conditions at and in the vicinity of the Site, or to  
7 Defendant's right and title thereto.

8 48. Defendant represents and certifies that it did not cause or contribute to a release  
9 or threatened release of hazardous substances at the Site and is not otherwise potentially liable  
10 under RCW 70.105D.040(1), except by becoming an owner and/or operator of the Site.

11 **XII. TRANSFER OF INTEREST IN PROPERTY**

12 49. Prior to any voluntary or involuntary conveyance or relinquishment of title,  
13 easement, leasehold, or other interest in any portion of the Property, Defendant shall provide  
14 for continued compliance with all of the conditions of this Decree. Prior to transfer of any  
15 legal or equitable interest in all or any portion of the Property during the effective period of  
16 this Decree, Defendant shall provide a copy of this Decree to any prospective purchaser,  
17 lessee, transferee, assignee, or other successor in interest of the Property; and, prior to any  
18 transfer, Defendant shall notify Ecology of said contemplated transfer.

19 50. Defendant shall require that any future use of the Property be consistent with  
20 the Restrictive Covenant set forth in Exhibit D.

1 **XIII. AMENDMENT TO CONSENT DECREE**

2 51. This Decree may only be amended by a written stipulation among the parties to  
3 this Decree that is thereafter entered and approved by order of the Court. Such amendment  
4 shall become effective upon entry by the Court or upon a later date if such date is expressly  
5 stated in the parties' written stipulation or the Court so orders.

6 52. Amendments may cover any subject or be for any purpose agreed to by the  
7 parties to this Decree. If Ecology determines that the subject of an amendment requires public  
8 input, Ecology will provide 30 days public notice before seeking entry of the amendment from  
9 the Court.

10 **XIV. DISPUTE RESOLUTION**

11 53. In the event a dispute arises as to an approval, disapproval, proposed  
12 modification, or other decision or action by Ecology's project coordinator, the parties shall use  
13 the dispute resolution procedure set forth below.

14 A. Upon receipt of the Ecology project coordinator's decision or upon  
15 discovery of Ecology project coordinator's action, Defendant has 14  
16 days to notify Ecology's project coordinator of any objection to the  
17 decision or action.

18 B. The parties' project coordinators shall then confer in an effort to resolve  
19 the dispute. If the project coordinators cannot resolve the dispute within  
20 14 days of Defendant's objection, Ecology's project coordinator shall  
21 issue a written decision.

22 C. Defendant may then request Ecology management review of the  
23 decision. This request must be submitted in writing to the Toxics  
24 Cleanup Program Manager within 7 days of receiving the Ecology  
25 project coordinator's written decision.  
26



1 D. Ecology's Toxics Cleanup Program Manager will review the dispute and  
2 must issue a written decision regarding the dispute within 30 days of  
3 Defendant's request for review. The Toxics Cleanup Program  
4 Manager's decision is Ecology's final decision on the disputed matter.

5 54. If Ecology's final written decision is unacceptable to Defendant, Defendant has  
6 the right to submit the dispute to the Court for resolution. The parties agree that one judge  
7 should retain jurisdiction over this case and will as necessary, resolve any dispute arising under  
8 this Decree. In the event Defendant presents an issue to the Court for review, the Court shall  
9 review any investigative or remedial action or decision of Ecology under an arbitrary and  
10 capricious standard of review.

11 55. The parties agree to use the dispute resolution process in good faith and agree to  
12 expedite, to the extent possible, the dispute resolution process whenever it is used. When  
13 either party uses the dispute resolution process in bad faith or for purposes of delay, the other  
14 party may seek sanctions. The parties may agree to substitute another dispute resolution  
15 process, such as mediation, for the procedure set forth above.

16 56. Implementation of these dispute resolution procedures does not provide a basis  
17 to delay any activities required in this Decree, unless Ecology agrees in writing to a schedule  
18 extension or the Court so orders.

#### 19 **XV. CONTRIBUTION PROTECTION**

20 57. With regard to claims for contribution against Defendant for matters addressed  
21 in this Decree, Ecology agrees that Defendant, its Successors in Interest and Assigns are  
22 entitled to protection from contribution actions or claims as is provided by MTCA, RCW  
23 70.105D.040, CERCLA § 107 or 113, or any other federal or state claim seeking, under other  
24 theories, substantially similar relief, to the extent allowed by MTCA, RCW 70.105D.040 and  
25 CERCLA § 113(f)(2). The contribution protection conferred in this section cannot be  
26

1 frustrated by the use of non-CERCLA or non-MTCA theories to seek relief in the nature of  
2 contribution or indemnification.

3 58. For purposes of this Section, "matters addressed" include all remedial actions  
4 taken or to be taken and all remedial action costs (including Ecology's oversight costs)  
5 incurred or to be incurred by Ecology or any other person with respect to the Site. "Matters  
6 addressed" do not include those remedial actions or remedial action costs as to which Ecology  
7 has reserved its rights under this Consent Decree (except for claims for failure to comply with  
8 this Decree), if Ecology asserts rights against Defendant coming within the scope of such  
9 reservations.

#### 10 **XVI. COVENANT NOT TO SUE UNDER MTCA; REOPENERS**

11 59. In consideration of compliance by Defendant with the terms and conditions of  
12 this Decree, Ecology agrees that compliance with this Decree shall stand in lieu of any and all  
13 administrative, legal, and equitable remedies and enforcement actions available to Ecology  
14 against Defendant for the release or threatened release of known or suspected hazardous  
15 substances at the Site covered by the terms of this Decree. Ecology covenants not to sue  
16 Defendant, its Successors in Interest and Assigns for matters covered by the terms of this  
17 Decree, provided that Defendant, or its Successors in Interest and Assigns, has substantially  
18 complied with this Decree.

19 A. Reopeners: In the following circumstances the State of Washington may  
20 exercise its full legal authority to address releases of hazardous  
21 substances at the Site notwithstanding the Covenant Not to Sue set forth  
22 above:

- 23 1. In the event Defendant fails to comply with the terms and  
24 conditions of this Decree, including all attachments, and, after  
25 written notice of noncompliance, fails to come into compliance.  
26

2. In the event new information becomes available regarding factors previously unknown to Ecology, and Ecology determines, in light of this information, that further remedial action is necessary at the Site to protect human health or the environment.
3. In the event the remedial action conducted at the Site fails to meet the requirements set forth in Section VII of this Decree and the attached Cleanup Action Plan.
4. In the event the Property is used for any activities that contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the Site, or increase health risks to persons at or in the vicinity of the Site.

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

1. Criminal liability;
2. Any Ecology action PLPs not party to this Decree; and
3. Any Claims by the State for Natural Resources Damages.

#### **XVII. DEFENDANT'S RESERVATION OF RIGHTS**

60. Defendant reserves all rights and defenses that it may have and which are not otherwise addressed in the Decree.

61. Except as provided herein for Defendant, this Decree does not grant any rights or affect any liabilities of any person, firm or corporation or subdivision or division of state, federal, or local government.

#### **XVIII. DISCLAIMER**

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

1 **XIX. RETENTION OF RECORDS**

2 63. Defendant shall retain all records, reports, documents, and underlying data in its  
3 possession relevant to the implementation of this Decree during the pendency of this Decree  
4 and for a period of ten years following the termination of this Decree pursuant to Paragraph 80,  
5 and shall insert in contracts with project contractors and subcontractors a similar records  
6 retention requirement. Upon request of Ecology, Defendant shall make all non-archived  
7 records available to Ecology and allow Ecology reasonable access for record review. All  
8 archived records shall be made available to Ecology by Defendant within a reasonable period  
9 of time.

10 **XX. SITE ACCESS**

11 64. Ecology or any Ecology authorized representatives shall have the authority to  
12 enter and freely move about portions of the Site over which Defendant has control at all  
13 reasonable times for the purposes of, inter alia: inspecting records, operation logs, and  
14 contracts related to the work being performed pursuant to this Decree; reviewing Defendant's  
15 progress in carrying out the terms of this Decree; conducting such tests or collecting such  
16 samples as Ecology may reasonably deem necessary; using a camera, sound recording, or other  
17 documentary type equipment to record work done pursuant to this Decree; and verifying the  
18 data submitted to Ecology by the Defendant. All parties with access to the Property pursuant  
19 to this Paragraph shall comply with approved health and safety plans. The parties  
20 acknowledge that Defendant does not and will not own all portions of the Site. Defendant will  
21 use reasonable efforts to obtain access to those portions of the Site it does not and will not  
22 own.

23 65. Notwithstanding any provision of this Decree, Ecology retains all of its access  
24 authorities and access rights, including enforcement authorities related thereto, under MICA  
25 and any other applicable state statute, regulation or order. Nothing in this Decree shall limit  
26 any right of access Ecology may have concerning releases of hazardous substances not

1 addressed by this Decree. The right of entry granted in this Section is in addition to any right  
2 Ecology may have to enter onto the Site pursuant to specific statutory or regulatory authority.  
3 Consistent with Ecology's responsibilities under state and federal law, Ecology, and any  
4 persons acting for it, shall use reasonable efforts to minimize any interference and shall use  
5 reasonable efforts not to interfere with the operations of Defendant by any such entry. In the  
6 event Ecology enters the Site for reasons other than emergency response, Ecology agrees that it  
7 shall provide reasonable advance notice to Defendant of any planned entry, as well as  
8 schedules and locations of activity on the Site. Ecology further agrees to accommodate  
9 reasonable requests that it modifies its scheduled entry or activities at the Site.

#### 10 **XXI. OTHER APPLICABLE LAWS**

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

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

1 applicable to the remedial action. Ecology shall make the final determination on whether the  
2 additional substantive requirements must be met by Defendant and on how Defendant must  
3 meet those requirements. Ecology shall inform Defendant in writing of these requirements and  
4 Defendant shall have an opportunity to comment on such requirements. Once established by  
5 Ecology, the additional requirements shall be enforceable requirements of this Decree.  
6 Defendant shall not begin or continue the remedial action potentially subject to the additional  
7 requirements until Ecology makes its final determination.

8 68. Ecology shall ensure that notice and opportunity for comment is provided to the  
9 public and appropriate agencies prior to establishing the substantive requirements under this  
10 section.

11 69. Pursuant to RCW 70.105D.090(2), in the event that Ecology determines that the  
12 exemption from complying with the procedural requirements of the laws referenced in RCW  
13 70.105D.090(1) would result in the loss of approval from a federal agency necessary for the  
14 state to administer any federal law, such exemption shall not apply and Defendant shall comply  
15 with both the procedural and substantive requirements of the laws referenced in RCW  
16 70.105D.090(1), including any requirements to obtain permits.

## 17 **XXII. SAMPLING, DATA REPORTING, AND AVAILABILITY**

18 70. With respect to the implementation of this Decree, Defendant shall make the  
19 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf  
20 available to Ecology and shall submit these results in accordance with Section XXIII of this  
21 Decree.

22 71. If requested by Ecology, Defendant shall allow split or duplicate samples to be  
23 taken by Ecology and/or Ecology's authorized representatives of any samples collected by  
24 Defendant pursuant to the implementation of this Decree. Defendant shall notify Ecology at  
25 least 7 working days in advance of any sample collection or work activity at the Site. Ecology  
26 shall, upon request, allow split or duplicate samples to be taken, at Defendant's sole expense,

1 by Defendant, or its authorized representatives, of any samples collected by Ecology pursuant  
2 to the implementation of this Decree, provided its does not unreasonably interfere with the  
3 Department's sampling. Without limiting Ecology's rights under Section XX, Ecology shall  
4 endeavor to notify Defendant at least 5 working days prior to any sampling collection activity.

### 5 XXIII. PROGRESS REPORTS

6 72. Defendant shall submit to Ecology written progress reports that describe the  
7 actions taken to implement the requirements of this Decree. The progress report shall be  
8 prepared as set forth in the following schedule:

- 9 \*Monthly during the excavation action; and  
10 \*Semi-annually during compliance monitoring activities.

11 The progress reports shall contain the following:

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

1           73. All progress reports shall be submitted by the tenth day of the month following  
2 each reporting period after the effective date of this Decree. Unless otherwise specified,  
3 progress reports and any other documents submitted pursuant to this Decree will be submitted  
4 in hard copy and electronic copy. Hard copies shall be sent by US mail, to Ecology's project  
5 coordinator.

#### 6   **XXIV. EXTENSION OF SCHEDULE**

7           74. An extension of schedule shall be granted only when a request for an extension  
8 is submitted in a timely fashion, generally at least 30 days prior to expiration of the deadline  
9 for which the extension is requested, and when good cause exists for granting the extension.  
10 All extensions shall be requested in writing. The request shall specify the reason(s) the  
11 extension is needed.

12           75. An extension shall only be granted for such period of time as Ecology  
13 determines is reasonable under the circumstances. A requested extension shall not be effective  
14 until approved by Ecology. Ecology shall act upon any written request for extension in a  
15 timely fashion. It shall not be necessary to formally amend this Decree pursuant to Section  
16 XIII when a schedule extension is granted.

17           76. The burden shall be on Defendant to demonstrate to the satisfaction of Ecology  
18 that the request for such extension has been submitted in a timely fashion and that good cause  
19 exists for granting the extension. Good cause includes, but is not limited to, the following:  
20 (1) circumstances beyond the reasonable control and despite the due diligence of Defendant,  
21 including delays caused by unrelated third parties or Ecology, such as (but not limited to)  
22 delays by Ecology in reviewing, approving, or modifying documents submitted by Defendant;  
23 or (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other  
24 unavoidable casualty; or (3) endangerment as described in Section XXV.  
25  
26



1 77. However, neither increased costs of performance of the terms of the Decree nor  
2 changed economic circumstances shall be considered circumstances beyond the reasonable  
3 control of Defendant.

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

- 6 A. Delays in the issuance of a necessary permit that was applied for in a  
7 timely manner; or  
8 B. Other circumstances deemed exceptional or extraordinary by Ecology;  
9 or  
10 C. Endangerment as described in Section XXV.

11 79. Ecology shall give Defendant written notification in a timely fashion of any  
12 extensions granted pursuant to this Decree.

### 13 XXV. ENDANGERMENT

14 80. In the event Ecology determines that activities implementing or in compliance  
15 with this Decree, or any other circumstances or activities, are creating or have the potential to  
16 create a danger to the health or welfare of the people on the Site or in the surrounding area or  
17 to the environment, Ecology may order Defendant to stop further implementation of this  
18 Decree for such period of time as needed to abate the danger or may petition the Court for an  
19 order as appropriate. During any stoppage of work under this Section, the obligations of  
20 Defendant with respect to the work under this Decree that is ordered to be stopped shall be  
21 suspended and the time periods for performance of that work, as well as the time period for any  
22 other work dependent upon the work that is stopped, shall be extended, pursuant to Section  
23 XXIV of this Decree, for such period of time as Ecology determines is reasonable under the  
24 circumstances.

25 81. In the event Defendant determines that activities undertaken in furtherance of  
26 this Decree or any other circumstances or activities are creating an endangerment to the people

1 on the Site or in the surrounding area or to the environment, Defendant may stop  
2 implementation of this Decree for such period of time necessary for Ecology to evaluate the  
3 situation and determine whether Defendant should proceed with implementation of the Decree  
4 or whether the work stoppage should be continued until the danger is abated. Defendant shall  
5 notify Ecology's project coordinator as soon as possible, but no later than 24 hours after such  
6 stoppage of work, and thereafter provide Ecology with documentation of the basis for the work  
7 stoppage. If Ecology disagrees with Defendant's determination, it may order Defendant to  
8 resume implementation of this Decree. If Ecology concurs with the work stoppage,  
9 Defendant's obligations shall be suspended and the time period for performance of that work,  
10 as well as the time period for any other work dependent upon the work that was stopped, shall  
11 be extended, pursuant to Section XXIV of this Decree, for such period of time as Ecology  
12 determines is reasonable under the circumstances.

#### 13 **XXVI. IMPLEMENTATION OF REMEDIAL ACTION**

14 82. If Ecology determines that Defendant has failed without good cause to  
15 implement the remedial action described herein and in the CAP, Ecology may, after notice to  
16 Defendant, perform any or all portions of the remedial action that remain incomplete. If

17 Ecology performs all or portions of the remedial action because of Defendant's failure to  
18 comply with the obligations under this Decree, Defendant shall reimburse Ecology for the  
19 costs of doing such work, provided that Defendant shall not be obligated under this Section to  
20 reimburse Ecology for costs incurred for work inconsistent with or beyond the scope of this  
21 Decree.

#### 22 **XXVII. PUBLIC PARTICIPATION**

23 83. Ecology shall maintain the responsibility for public participation at the Site.  
24 However, Defendant shall cooperate with Ecology with respect to the following public  
25 participation activities:  
26

- 1 A. Prepare drafts of public notices and fact sheets at important stages of the  
2 remedial action, such as the submission of work plans and engineering  
3 design reports. Ecology will finalize (including editing if necessary) and  
4 distribute such fact sheets and prepare and distribute public notices of  
5 Ecology's presentations and meetings;
- 6 B. Each party shall notify the other party's project coordinator prior to the  
7 preparation of all press releases and fact sheets, and shall allow the other  
8 party to review and comment on the documents. In addition, each party  
9 shall notify the other party's project coordinator at least one week before  
10 major meetings with the interested public and local governments  
11 regarding the remediation of the Site;
- 12 C. Participate in public presentations on the progress of the remedial action  
13 at the Site. Participation may be through attendance at public meetings  
14 to assist in answering questions, or as a presenter;
- 15 D. In cooperation with Ecology, arrange and/or continue information  
16 repositories to be located at the following locations:

17 Tacoma Public Library  
18 Main Branch  
19 Government Documents  
20 1102 Tacoma Avenue South  
21 Tacoma, Washington

22 Department of Ecology  
23 Southwest Regional Office  
24 300 Desmond Drive  
25 Lacey, Washington

26 Citizens for a Health Bay  
917 Pacific Avenue, Suite 406  
Tacoma, Washington

At a minimum, copies of all public notices, fact sheets, and press releases, all quality assured monitoring data, remedial action plans, supplemental remedial planning documents, and all

1 other similar documents relating to performance of the remedial action required by this Decree  
2 shall be promptly placed in these repositories.

3  
4 **XXVIII. DURATION OF DECREE AND RETENTION OF JURISDICTION;  
CERTIFICATIONS BY ECOLOGY**

5 84. This Decree remains in effect and this Court retains jurisdiction over both the  
6 subject matter of this Decree and the parties for the duration of the performance of the  
7 Decree's terms and provisions for the purpose of enabling either party to apply to the Court,  
8 consistent with the dispute resolution process in Section XIV, and the amendment process in  
9 Section XIII, for such further order, direction, and relief as may be necessary or appropriate to  
10 ensure that obligations of the parties have been satisfied. The Decree remains in effect until  
11 Defendant has received written notification from Ecology that the requirements of this Decree  
12 have been satisfactorily completed. Ecology shall provide such written notification or notice  
13 of any deficiencies in the completion of the requirements of this Decree within 180 days of  
14 receiving notice from Defendant that the requirements of the Decree have been satisfied.  
15 Within 60 days of Defendant's written notice that any noted deficiencies have been corrected,  
16 ~~Ecology shall provide written notification that the requirements of the Decree have been~~  
17 satisfied or notice of any deficiencies that still remain. The notification of completion shall be  
18 in substantially the form shown in Exhibit E. Upon receipt of written notification from  
19 Ecology that the requirements of this Decree have been satisfactorily completed, the parties  
20 shall move the Court to dismiss the Consent Decree. The provisions set forth in Section XV  
21 (Contribution Protection), Section XVI (Covenant Not to Sue Under MICA; Reopeners),  
22 Section XXX (Indemnification), and other such continuing or reserved rights of Defendant or  
23 Ecology under this Decree shall survive the dismissal of the Decree pursuant to this paragraph.  
24 This Decree shall in no way limit the authority of Ecology to obtain all legal or equitable  
25  
26

1 remedies available against persons not party to this Decree and against all persons, parties or  
2 non-parties, for releases of hazardous substances at the Site not covered by this Decree.

### 3 **XXIX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

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

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

### 14 **XXX. INDEMNIFICATION**

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

### 23 **XXXI. CLAIMS AGAINST THE STATE**

24 88. Defendant hereby agrees that it will not seek to recover any costs accrued in  
25 implementing the remedial action required by this Decree from the State of Washington or any  
26 of its agencies and further that Defendant will make no claim against the state toxics control

1 account or any local toxics control account for any costs incurred in implementing this Decree.  
2 Except as provided above, however, Defendant expressly reserves its rights to seek to recover  
3 any costs incurred in implementing this Decree from any other PLP.

4 **XXXII. EFFECTIVE DATE**

5 89. This Decree is effective only after the date on which title to the Property vests  
6 in Defendant and the date on which the Court enters the Decree.

7  
8 SO ORDERED this 30 day of Dec, 2003

9  
10   
11 JUDGE/COURT COMMISSIONER  
12 Pierce County Superior Court


13 FILED  
14 IN COUNTY CLERK'S OFFICE

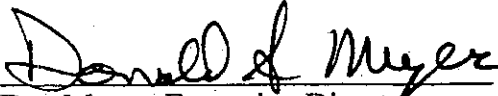
15 A.M. DEC 30 2003 P.M.  
16 PIERCE COUNTY, WASHINGTON  
17 KEVIN STOCK, County Clerk  
18 BY \_\_\_\_\_ DEPUTY

1 The undersigned parties enter into this Prospective Purchaser Consent Decree on the  
2 date specified below.

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FOSS WATERWAY DEVELOPMENT AUTHORITY

  
Kirk A. Lilley, WSBA #20369  
Preston Gates & Ellis LLP  
Attorneys for Defendant Foss Waterway  
Development Authority

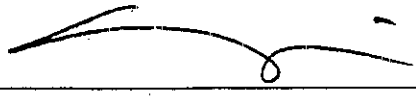
  
Don Meyer, Executive Director


DATED: 12/30/03

DATED: 12/30/03

CHRISTINE O. GREGOIRE  
Attorney General

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

  
STEVEN J. THIELE, WSBA #20275  
Assistant Attorney General  
Attorneys for Plaintiff  
State of Washington  
Department of Ecology

  
James Pendowski  
Program Manager  
Toxics Cleanup Program

DATED: December 30, 2003

DATED: 12/30/03

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**EXHIBIT A – Site Map**



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**EXHIBIT B – Cleanup Action Plan**

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3 **EXHIBIT C – Schedule**  
4

5 As detailed in the Cleanup Action Plan in Exhibit B, the cleanup work will be  
6 conducted in two phases.

7 **Phase 1 schedule:**

- 8
- 9 • Site development to prepare for temporary use is expected to begin during spring or  
10 summer 2004 and extend 16 weeks.
  - 11 • Because the access and use that the Phase 1 cleanup is tied to the City's construction of  
12 the D Street overpass project, actual completion could be delayed if the City's work is  
13 delayed.
  - 14 • The City's project timing notwithstanding FWDA will complete the Phase 1 work no  
15 later than December 31, 2004.

16 **Phase 2 schedule:**

- 17 • The final cleanup will be conducted as part of the development of the Site for use as a  
18 public park. The overall site development is expected to last for 2 years, with the  
19 cleanup work being conducted at the beginning of the 2-year development period.
- 20 • Final Site cleanup and development timing is contingent on completion of the D Street  
21 overpass project by the City of Tacoma. The overpass project is expected to be  
22 completed by 2007.
- 23 • The Phase 2 cleanup work may be completed, therefore, as early as 2007, but if the  
24 City project is delayed, may not occur until 2009. FWDA will complete the Phase 2  
25 work no later than December 31, 2009.
- 26

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. DEC 30 2003 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
  
Plaintiff,

NO. 03 2 14513 6  
SUMMONS

v.

FOSS WATERWAY  
DEVELOPMENT AUTHORITY,  
  
Defendant.

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. DEC 30 2003 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

~~TO: Foss Waterway Development Authority, and its attorney, Kirk Lilley.~~

A lawsuit has been started against you in the above-entitled court by the State of Washington, Department of Ecology. Plaintiff's claim is stated in the written Complaint, a copy of which is served upon you with this Summons.

The parties have agreed to resolve this matter by entry of a Consent Decree, a copy of which is also attached. Accordingly, this Summons shall not require the filing of an answer.

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Further, all disputes arising under this cause shall be resolved under the terms of the Decree.

DATED this 30<sup>th</sup> day of December, 2003.

CHRISTINE O. GREGOIRE  
Attorney General



STEVEN J. THIELE, WSBA #20275  
Assistant Attorney General

Attorneys for Plaintiff  
State of Washington  
Department of Ecology  
(360) 586-4619

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FILED  
IN COUNTY CLERK'S OFFICE

A.M. DEC 30 2003 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
  
Plaintiff,

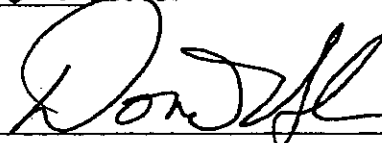
v.

FOSS WATERWAY  
DEVELOPMENT AUTHORITY,  
  
Defendant.

NO. 03 2 14513 6  
ORDER ENTERING CONSENT  
DECREE  
2110 EAST D STREET, TACOMA,  
WASHINGTON  
(AMERICAN PLATING SITE)

Having reviewed the Joint Motion for Entry of the Consent Decree, it is hereby  
~~ORDERED AND ADJUDGED~~ that the Consent Decree in this matter is entered and that the  
Court shall retain jurisdiction over the Consent Decree to enforce its terms.

DATED this 30 day of December, 2003.

  
\_\_\_\_\_  
JUDGE/COMMISSIONER  
Pierce County

1 Approved as to form,  
notice of presentation waived:

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FOSS WATERWAY DEVELOPMENT AUTHORITY



Kirk A. Lilley, WSBA #20369  
Preston Gates & Ellis LLP  
Attorneys for Defendant Foss Waterway  
Development Authority

CHRISTINE O. GREGOIRE  
Attorney General



STEVEN J. THIELE, WSBA #20275  
Assistant Attorney General  
Attorneys for Plaintiff  
State of Washington  
Department of Ecology

FILED  
IN COUNTY CLERK'S OFFICE

AM DEC 30 2003 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

FOSS WATERWAY  
DEVELOPMENT AUTHORITY,

Defendant.

NO. 03 2 14513 6

COMPLAINT

Plaintiff, State of Washington, Department of Ecology ("Ecology") alleges as follows:

**I. DESCRIPTION OF ACTION**

1. This action is brought on behalf of the State of Washington, Department of Ecology, to enter a settlement agreement, known as a Prospective Purchaser Consent Decree ("Decree") for a remedial action at a facility where there have been releases and/or threatened releases of hazardous substances.

2. The Complaint and settlement are limited to the scope of the Decree. The facility, or Site, is referred to as the American Plating property. The Site consists of the property located at 2110 East D Street in Tacoma, Washington.

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## II. JURISDICTION

3 This Court has jurisdiction under RCW 70.105D, the Model Toxics Control Act  
4 (“MTCA”). This Court has jurisdiction over the subject matter and over the parties pursuant to  
5 the MTCA. Venue is proper in Pierce County, the location of the property at issue.

6 4. Authority is conferred upon the Washington State Attorney General by RCW  
7 70.105D.040(5)(a) to agree to a settlement with any person not currently liable for remedial  
8 action at a facility, who intends to purchase, redevelop or reuse a site if, after public notice,  
9 Ecology finds the proposed settlement would lead to a more expeditious cleanup of hazardous  
10 substances in compliance with cleanup standards under RCW 70.105D.030(2)(e). In addition,  
11 Ecology must also find that the proposed redevelopment or reuse is not likely to contribute to  
12 the existing releases or threatened releases or interfere with remedial actions that may be  
13 needed on the Site or increase health risks to persons at or in the vicinity of the Site. Lastly,  
14 the Attorney General must find that the settlement will yield substantial new resources to  
15 facilitate the cleanup and expedite remedial action consistent with the rules adopted under  
16 RCW 70.105D. Ecology and the Attorney General have made the required findings. Under  
17 RCW 70.105D.040(4)(b), such a settlement must be entered as a Consent Decree issued by a  
18 court of competent jurisdiction.

19 5. Ecology has determined that a release or threatened release of a hazardous  
20 substance has occurred at the Site.

21 6. Ecology has given notice to Foss Waterway Development Authority, of  
22 Ecology's determination as provided in RCW 70.105D.020(12), that upon purchase of the site  
23 it will be a potentially liable person as owner and/or operator (defined in 70.105D.020(12)) of  
24 the Site and notice that there has been a release and/or threatened release of hazardous  
25 substances at the Site.  
26



1  
2 **III. PARTIES**

3 7. Plaintiff Ecology is an agency of the State of Washington responsible for  
4 overseeing remedial action at Sites contaminated with hazardous substances under  
5 RCW 70.105D.

6 8. Defendant is Foss Waterway Development Authority

7 **IV. FACTUAL ALLEGATIONS**

8 9. The Site is located at 2110 East D Street in Tacoma, Washington. It is bounded  
9 to the west by the Thea Foss Waterway. The businesses operating to the north and south of the  
10 Site are, respectively, Foss Landing Marina and Berg Scaffolding Company. The Site is  
11 bounded to the east by East D Street.

12 10. The site property has been owned by Lewis R. Jones since 1962. Between 1955  
13 and 1976, the Site was occupied by Puget Sound Plating and Seymour Electroplating. From  
14 1976 to 1986, the Site was occupied by American Plating. All three of these firms performed  
15 metal electroplating, including brass, cadmium, chromium, copper, nickel and zinc plating.  
16 American Plating ceased operation in 1986. No operations are currently being conducted at  
17 the Site.

18 11. Several environmental studies have been performed on the Site. EPA conducted a  
19 preliminary site investigation in March of 1986. In 1988, 1989 and 1994, Applied  
20 Geotechnology, Inc. conducted Phase I and II site investigations and a supplemental ground  
21 water investigation. In 1995, PRC Environmental Management Inc., working under contract to  
22 the EPA, prepared a Comprehensive Groundwater Monitoring Evaluation, which included an  
23 additional groundwater sampling round. The Tacoma-Pierce County Health Department  
24 completed a Site Hazard Assessment in August of 1997. Ecology also conducted sampling as  
25 part of its partial Interim Action Plan cleanup on the site.  
26

1 12. These investigations show that the Site consists of fill of various thickness  
2 overlying unconsolidated silt which ranges from 0 to over 15 feet thick. Beneath the silt is a  
3 deposit of sand, gravel and silt which ranges in thickness from 5 to over 10 feet. The deepest  
4 unit encountered is a dense to very dense silty sand to silty gravel of unknown thickness, which  
5 was encountered approximately 25-30 feet below the surface. This unit was interpreted to be  
6 glacial till. Ground water at the site occurs primarily in the upper fill unit and in the sand,  
7 gravel and silt unit. Depth to groundwater ranges from approximately 5 to 9 feet below ground  
8 surface. Groundwater at the site is in close communication with the marine water in the  
9 adjacent Thea Foss Waterway as evidenced by the significant tidal influence on the onsite  
10 wells and the high salinity in much of the groundwater.

11 13. The investigations found elevated levels of metals associated with electroplating  
12 processes in the Site's soil. Elevated levels of cadmium, copper, lead, cyanide and vinyl  
13 chloride were found on the Site, but the elevated concentrations appeared to be restricted to  
14 fairly shallow soils. Concentrations of these contaminants of concern (COC) were highest in  
15 the immediate vicinity of previous plating operations.

16 14. The investigations also found elevated levels of the copper, nickel and cyanide  
17 in groundwater. The likely sources for these contaminants is leaching from contaminated soils  
18 at the Site. Groundwater is not used as a source of drinking water at the Site or surrounding  
19 properties.

20 15. These environmental conditions were reported as part of an Interim Action Plan  
21 conducted for Ecology by Science Applications International Corporation and submitted on  
22 April 25, 2003.

23 16. In the Spring of 2003, Ecology conducted extensive cleanup activities at the  
24 Site. Part of those activities included demolishing and removing the two buildings that housed  
25 the electroplating lines and chemical storage areas. Due to funding and time constraints,  
26

1 Ecology's cleanup of the Site was not completed. There are four places remaining on the Site  
2 where the soil designates as Hazardous Waste and requires removal. There is also  
3 approximately 288 yards of cubic yards of contaminated concrete that needs to be removed  
4 from the Site. Finally, five wells currently existing at the site will need to be abandoned.  
5 Defendant has proposed and Ecology has approved a Cleanup Action Plan for final  
6 remediation of the Site.

7 **V. CAUSES OF ACTION**

8 17 Plaintiff realleges paragraphs 1 through 16, above.

9 18 Ecology alleges that, upon purchase, the Defendant is subject to potential  
10 liability under RCW 70.105D.040(1)(a).

11 19 Ecology and the Defendant have entered into a Prospective Purchaser Consent  
12 Decree requiring remedial actions at the facility upon purchase of the facility by the Defendant.  
13 The Decree has been subject to public notice and comment under RCW 70.105D.040(4)(a).  
14 Ecology has addressed all comments received in a responsiveness summary, attached to the  
15 Declaration of Marv Coleman, which is being filed simultaneously with this complaint.

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**VI. PRAYER FOR RELIEF**

WHEREAS Ecology and Defendant have voluntarily entered into a proposed Decree, Ecology requests that the Court, pursuant to RCW 70 105D.040, approve and order the entry of the proposed Decree. Ecology further requests that the Court retain jurisdiction to enforce the terms of the Decree.

DATED this 30<sup>th</sup> day of December, 2003

CHRISTINE O. GREGOIRE  
Attorney General



STEVEN J. THIELE, WSBA #20275  
Assistant Attorney General

Attorneys for Respondent  
State of Washington  
Department of Ecology  
(360) 586-4619

FILED  
IN COUNTY CLERK'S OFFICE

A.M. DEC 30 2003 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
  
Plaintiff,

v.

FOSS WATERWAY  
DEVELOPMENT AUTHORITY,  
  
Defendant.

NO.  
  
DECLARATION OF  
MARV COLEMAN

I, MARV COLEMAN, declare as follows:

1. I am over twenty-one years of age and am competent to testify herein. The facts set forth in this declaration are from my personal knowledge.

2. I am employed as an environmental specialist at the Washington State Department of Ecology, Southwest Regional Office, Toxics Cleanup Program. I am the project coordinator and am knowledgeable on matters relating to the site located at 2110 East D Street in Tacoma, Washington.

3. On behalf of Ecology and the Attorney General's Office, I took part in the negotiations which led to the Prospective Purchaser Consent Decree that is being presented to the Court.

1 4. The Consent Decree was the subject of public notice and public comment as  
2 required by RCW 70.105D.040(4)(a).

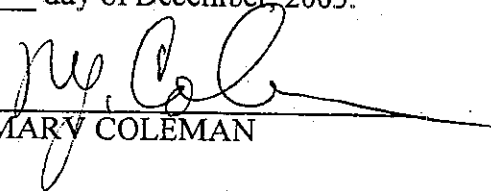
3 5. Ecology received comments during the public comment period, which are  
4 included in the Responsiveness Summary attached to this declaration as Attachment A.

5 6. Ecology has determined that no additional public comment period under WAC  
6 173-340-600(9)(c) is required.

7 7. Ecology has determined that the proposed remedial action will lead to a more  
8 expeditious cleanup of hazardous substances in compliance with cleanup standards under  
9 RCW 70.105D.030(2)(e).

10 8. I declare under penalty of perjury of the laws of the State of Washington that  
11 the foregoing is true and correct.

12 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2003.

13   
14 MARY COLEMAN  
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**ATTACHMENT "A"**

ATTACHMENT A

RESPONSIVENESS SUMMARY  
PROSPECTIVE PURCHASER CONSENT DECREE  
RE: 2110 EAST D STREET  
TACOMA, WASHINGTON

As of the close of the 30 day comment period for the above referenced Consent Decree, Ecology has received only positive comment regarding the proposed actions. Copies of those comment letters are attached.

As a result, Ecology has determined that no responses to public comment are necessary and that a public meeting for the proposed actions will not be necessary.

Ecology would like to thank those parties who provided comments.





**City of Tacoma**  
Tacoma Economic Development Department

RECEIVED  
DEPT. OF ECOLOGY/SW/SB

'03 DEC -2 A10 :45

December 2, 2003

Mr. Marv Coleman  
Department of Ecology  
Southwest Regional Office  
P O Box 47775  
Olympia WA 98504-7775

Dear Mr. Coleman:

**RE: PROSPECTIVE PURCHASER AGREEMENT  
JONES PROPERTY, TACOMA WASHINGTON**

The City of Tacoma is pleased to submit this letter of support for this Prospective Purchaser Agreement and SEPA checklist. As you know, the City of Tacoma and the Foss Waterway Development Authority have worked for many years to reclaim contaminated properties on Tacoma's Thea Foss Waterway. This acquisition by the Foss Waterway Development Authority will further the community's vision for a clean and redeveloped waterfront with the future development of park and open space.

The City appreciates the effort that is being made by the Department of Ecology to see that this property will have a public benefit. The State's ability to work with the Development Authority continues to be a key factor in the ability to reclaim these contaminated properties, remediate them and return them to a public use.

Thank you for your consideration.

Juli Wilkerson  
Director

**Coleman, Marv**

---

**From:** Rollie Herman [rollie@westpacmarine.com]  
**Sent:** Thursday, December 11, 2003 10:33 AM  
**To:** Coleman, Marv  
**Subject:** FWRA and American Plating site (Jones Property)



Dear Mr. Coleman,

The Hillside Development Council (HDC) supports the action of the Foss Waterway Redevelopment Authority in attempting to develop the "Jones Property" at the head of the Thea Foss waterway into a park/open space area. The HDC is comprised of residents, property owners and business owners centered on the hillside of Tacoma, southwest of the Jones Property.

This area of Tacoma is growing rapidly with residential development leading the way. Open spaces and parks are a missing feature in this part of town and this project will be a major step in eliminating this missing element.

Sincerely,  
Rollie Herman  
President, Hillside Development Council  
[www.HDCTacoma.org](http://www.HDCTacoma.org)

Mr. Marv Coleman  
Department of Ecology  
Southwest Regional Office  
P O Box 47775  
Olympia, WA. 98504-7775  
or  
mcol461@ecy.wa.gov

Re: American Plating Site – Tacoma

Dear Mr. Coleman:

The LeMay Museum fully supports the Foss Waterway Development Authority's (FWDA) request for a Consent Decree and SEPA checklist in conjunction with their acquisition of the American Plating site. The FWDA has a track record of doing development in a manner that facilitates environmental cleanup and puts previously under utilized properties to a beneficial use. Development of this site at the head of the waterway would best be used for a redevelopment purpose that would support the cleanup activities currently underway in and around the Foss. The FWDA plan to make this park and open space serves that purpose.

The park and open space will be an excellent compliment to the museum. The Museum will be located south of the property. With an expected attendance of 500,000 a year it will be important to the City and museum to have facilities that encourage visitor's enjoyment of our community. We strongly urge you to complete these agreements with due speed so the transformation of the site can move forward.

Sincerely,

David Madeira  
Chief Executive Officer  
Harold E. LeMay Museum

Cc: Don Meyer, Executive Director  
Foss Waterway Development Authority



Keith Stone  
President

Julie Anderson  
District Manager

207m  
2501 East D Street, Suite 207A  
Tacoma, Washington 98421  
Phone 253.383.1113  
Mobile 431.7321  
Fax 272.2541

mail: domedistrict@qwest.net  
www.domebusinessdistrict.com

December 2, 2003

Marv Coleman  
Department of Ecology, SW Regional Office  
P O Box 47775  
Olympia WA 98504-7775

Re: FWRA and American Plating site (Jones Property)

Dear Mr. Coleman:

We understand that the Foss Waterway Redevelopment Authority (FWRA), in cooperation with the Department of Ecology, has submitted a Perspective Purchaser Agreement (PPA) and SEPA checklist for the property commonly known as the American Plating site (Jones Property). We also understand that FWRA intends to develop this property as park/open space with an emphasis on non-motorized boating activities and event space.

The Dome District Development Group offers its enthusiastic support of the submitted SEPA checklist and PPA. The Dome District strongly supports the FWRA planning, commitment to reclamation and revitalization of contaminated properties in Tacoma.

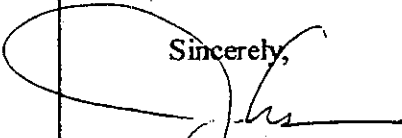
The Dome District is one of 12 business districts targeted by the City of Tacoma for revitalization. The Jones Property identified in this PPA and SEPA checklist are positioned adjacent to our development area. Reclamation and restoration of this property directly affects the Dome District's ability to become the pedestrian-friendly urban center.

Without the FWRA purchase of The Jones Property, the southern tip of the Foss Waterway will be:

- Under utilized and plagued with contaminated materials
- A barrier to pedestrian movement between the Dome District and the Foss Waterway area
- A discouragement to private housing and development, which are essential to the Dome District revitalization

We strongly urge you to facilitate and support the PPA and the SEPA application so The Jones Property can be returned to a productive use and leverage the significant investments that have already been made in the Foss Waterway and the Dome District's multi-modal transit center.

Sincerely,

  
Julie Anderson  
Manager,  
Dome District

RECEIVED

DEC 0 8 2003

Washington State  
Department of Ecology



## CITIZENS FOR A HEALTHY BAY

917 Pacific Avenue  
Suite 406  
Tacoma, WA 98402  
Phone (253) 383-2429  
Fax (253) 383-2446  
chb@wa.net  
[www.tacoma.net/~chb](http://www.tacoma.net/~chb)

December 5, 2003

Marv Coleman  
Department of Ecology  
Southwest Regional Office  
P O Box 47775  
Olympia, WA 98504-7775

Re: Cleanup Action Plan, SEPA Environmental Checklist and Perspective Purchaser Agreement - American Plating Company Site Remediation

Dear Mr. Coleman:

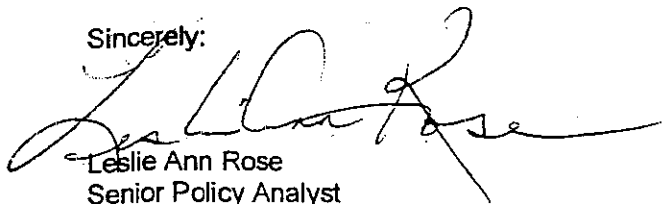
The purpose of this letter is to provide comments by Citizens for a Healthy Bay (CHB) regarding the American Plating Company site remediation.

Citizens for a Healthy Bay (CHB) is pleased to support acquisition of the property commonly known as the American Plating site (Jones Property) by the Foss Waterway Development Authority (FWDA) for the purpose of developing park/open space. CHB has reviewed the Perspective Purchaser Agreement (PPA), Cleanup Action Plan and SEPA checklist for this action and finds the project to be consistent with the community's goals and objectives for clean up and redevelopment along the Foss Waterway.

The remedial action approach outlined in the cleanup action plan has been applied effectively to other FWDA sites on the west shoreline of Foss Waterway. Based on FWDA's prior success and the fact that FWDA is a public entity, CHB is confident that the site clean up and development of park/open space will be appropriately carried out to protect the community's best interests.

CHB is a community-based, non-profit organization representing the greater Commencement Bay community and working to engage citizens to clean up, restore and protect the Commencement Bay environs. As such, over the past 12 years, we have acted to provide community oversight and public participation into the Superfund clean up of Commencement Bay.

Sincerely:



Leslie Ann Rose  
Senior Policy Analyst

cc: Su Dowie, FWDA

A tax-exempt  
nonprofit organization with  
501(c)(3) status

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8 **STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT**

9 STATE OF WASHINGTON,  
10 DEPARTMENT OF ECOLOGY,  
11 Plaintiff,

12 v.

13 FOSS WATERWAY  
14 DEVELOPMENT AUTHORITY,  
Defendant.

NO.

03 2 14513 6  
JOINT MOTION FOR ENTRY OF  
CONSENT DECREE  
2110 EAST D STREET, TACOMA,  
WASHINGTON  
(AMERICAN PLATING SITE)

15 **I. INTRODUCTION**

16 Plaintiff, State of Washington, Department of Ecology ("Ecology"), and Defendant,  
17 Foss Waterway Development Authority (FWDA) bring this motion seeking entry of the  
18 attached Consent Decree ("Decree"). This motion is based upon the pleadings filed in this  
19 matter.

20 **II. RELIEF REQUESTED**

21 The Parties request that the Court approve and enter the attached Decree. The Decree  
22 fully disposes of all issues in this matter.

23 **III. FACTS**

24 The Decree between the Defendant and Ecology resolves the potential liability of  
25 Defendant for known and suspected contamination at the 2110 East D Street property (the  
26

1 "Site") arising from a release or threatened release of hazardous substances, promotes the  
2 public interest by expediting cleanup activities at the Site, and facilitates the cleanup and  
3 redevelopment of contaminated industrial properties in Tacoma, Washington.

4 **IV. AUTHORITY**

5 Authority is conferred upon the Washington State Attorney General by RCW  
6 70.105D.040(5)(a) to agree to a settlement with any person not currently liable for remedial  
7 action at a facility, who intends to purchase, redevelop or reuse a site if, after public notice,  
8 Ecology finds the proposed settlement would lead to a more expeditious cleanup of hazardous  
9 substances in compliance with cleanup standards under RCW 70.105D.030(2)(e). In addition,  
10 Ecology must also find that the proposed redevelopment or reuse is not likely to contribute to  
11 the existing releases or threatened releases or interfere with remedial actions that may be  
12 needed on the Site or increase health risks to persons at or in the vicinity of the Site. Lastly,  
13 the Attorney General must find that the settlement will yield substantial new resources to  
14 facilitate the cleanup and expedite remedial action consistent with the rules adopted under  
15 RCW 70.105D. Ecology and the Attorney General have made the required finding. Under  
16 RCW 70.105D.040(4)(b), such a settlement must be entered as a Consent Decree issued by a  
17 court of competent jurisdiction.

18 The parties believes it is appropriate for the Court to exercise its judicial discretion and  
19 approve the attached Decree.

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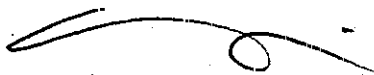
1  
2 V. CONCLUSION

3 The parties request that the Court approve and enter the attached Decree in full  
4 resolution of the matters involved in this action. The parties also request that the Court retain  
5 jurisdiction over this action until the work required by the Consent Decree is completed, at  
6 which time the parties anticipate seeking dismissal of this action.

7 DATED this \_\_\_\_ day of December, 2003.

8 CHRISTINE O. GREGOIRE  
9 Attorney General

FOSS WATERWAY DEVELOPMENT  
AUTHORITY

10   
11 STEVEN J. THIELE, WSBA #20275  
12 Assistant Attorney General  
13 Attorneys for Plaintiff  
14 Department of Ecology  
15 (360) 586-4619

KIRK A. LILLEY, WSBA #20369  
Preston Gates & Ellis, LLP  
Attorneys for Defendant Foss Waterway  
Development Authority  
(206) 623-7580