

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

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

CITY OF EVERETT,

Defendant.

NO.

CONSENT DECREE

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I. INTRODUCTION

1
2 A. The Landfill Tire Fire Site is located in Everett, Washington and owned by the
3 City of Everett. The Site is a closed municipal landfill site that operated from approximately
4 1917 through 1974 on approximately 70 acres in a predominately commercial area.

5 B. From approximately 1977 through 1984 approximately 2 million tires were
6 accumulated on the Site by a tire chipping business. In 1983 and 1984, two fires occurred
7 burning approximately one million tires. The City of Everett commenced an environmental
8 investigation regarding the tire fire ash in 1985.

9 C. In 1989, Ecology named the City of Everett as a potentially liable party for the
10 Site under the Model Toxics Control Act, RCW Chapter 70.105D.

11 D. In 1990, the City of Everett and Ecology signed a Remedial Action Order on
12 Consent to conduct a Remedial Investigation/Feasibility Study (RI/FS) of the Site. The study
13 identified the Site as a potential threat to human health and the environment. The study
14 indicated that landfill leachate was seeping uncontrolled into the Snohomish River. In
15 addition, the tire fire ash was originally classified at that time as dangerous waste under WAC
16 Chapter 173-303 the "Dangerous Waste Regulation" of 1990. However, in November 1995,
17 the "Dangerous Waste Regulation" was amended to make the criteria less stringent for zinc,
18 the principal constituent of tire fire ash. Re-evaluation of the Site ash under the new criteria
19 concluded that the ash was a solid, not a dangerous waste.

20 E. In 1994, Ecology issued an Enforcement Order to the City of Everett, which
21 required the City of Everett to conduct a Supplemental RI/FS and interim actions. The
22 supplemental RI included investigation of landfill gas and the existing landfill cover. The
23 Supplemental FS evaluated the City of Everett's proposed ash treatment alternative. The
24 interim actions included surface water control and installation of a leachate system along the
25 entire eastern border of the landfill. In 1995, the landfill area (except the tire fire ash area) was

1 regraded and covered by a minimum of two feet of clean soil to achieve better surface water
2 control.

3 F. In 1997, Ecology amended the 1994 Enforcement Order to include redesigning
4 the leachate collection system and covering the tire fire ash area as interim actions. The
5 collection system was re-located fifty feet inward of the landfill's eastern boundary from the
6 original design. These two interim actions were completed in the spring of 1998.

7 G. In entering into this Consent Decree (Decree), the mutual objective of the
8 Washington State Department of Ecology (Ecology), and the City of Everett is to provide for
9 remedial action at a facility where there has been a release or threatened release of hazardous
10 substances. This Decree requires the City of Everett to undertake the remedial actions
11 specified in the Cleanup Action Plan and Scope of Work and Schedule attached as Exhibit C
12 and D to this Consent Decree. Ecology has determined that these actions are necessary to
13 protect public health and the environment.

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

19 I. In signing this Decree, the City of Everett agrees to its entry and agrees to be
20 bound by its terms.

21 J. By entering into this Decree, the parties do not intend to discharge non-settling
22 parties from any liability they may have with respect to matters alleged in the complaint. The
23 parties, including the City of Everett's or its Successors and Assigns, retain the right to seek
24 reimbursement, in whole or in part, from any liable persons for sums expended under this
25 Decree.

1 K. This Decree shall not be construed as proof of liability or responsibility for any
2 releases of hazardous substances or cost for remedial action nor an admission of any facts;
3 provided, however, that the City of Everett shall not challenge the jurisdiction of Ecology in
4 any proceeding to enforce this Decree.

5 L. The Court is fully advised of the reasons for entry of this Decree, and good
6 cause having been shown:

7 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:**

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

9 A. This Court has jurisdiction over the subject matter and over the parties pursuant
10 to Ch. 70.105D RCW, the Model Toxics Control Act (MTCA).

11 B. Authority is conferred upon the Washington State Attorney General by RCW
12 70.105D.040(4)(a) to agree to a settlement with any potentially liable person if, after public
13 notice and hearing, Ecology finds the proposed settlement would lead to a more expeditious
14 cleanup of hazardous substances in compliance with cleanup standards. RCW
15 70.105D.040(4)(b) requires that such a settlement be entered as a consent decree issued by a
16 court of competent jurisdiction.

17 C. Ecology has determined that a release or threatened release of hazardous
18 substances has occurred at the Site which is the subject of this Decree.

19 D. Ecology has given notice to the City of Everett, as set forth in RCW
20 70.105D.020(16), of Ecology's determination that the City of Everett is a potentially liable
21 person for the Site and that there has been a release or threatened release of hazardous
22 substances at the Site.

23 E. The City of Everett has agreed to undertake the actions specified in this Decree
24 and consents to the entry of this Decree under the MTCA.

1 F. The actions to be taken pursuant to this decree are necessary to protect public
2 health, welfare and the environment.

3 III. PARTIES BOUND

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

14 IV. DEFINITIONS

15 Unless otherwise expressly provided herein, terms used in this Consent Decree that are
16 defined in MTCA or in regulations promulgated thereunder shall have the meanings assigned
17 to them in MTCA or in such regulations. Whenever terms listed below are used in this
18 Consent Decree, the following definitions shall apply:

19 A. Site: The Site, referred to as the Everett Landfill/Tire Fire Site is located at
20 2902-36th Street East, Everett, Washington, (the Property), and where all hazardous substances
21 from the Property have come to be located..

22 B. Property: The Property is more particularly described in Exhibit A to this
23 Decree, which is a detailed site diagram, and in the legal descriptions contained in Exhibit B.

24 C. Parties: Refers to the Washington State Department of Ecology and the City of
25 Everett.

1 D. Consent Decree or Decree: Refers to this Consent Decree and each of the
2 exhibits to the Decree. All exhibits are integral and enforceable parts of this Consent Decree.
3 The terms "Consent Decree" or "Decree" shall include all exhibits to the Consent Decree.

4 **V. STATEMENT OF FACTS**

5 Ecology makes the following findings of fact without any express or implied
6 admissions by the City of Everett:

7 1. The City of Everett presently owns an approximately 70-acre property located
8 at 2902-36th Street East, Everett, Washington. The Site is a closed municipal landfill that
9 operated from approximately 1917 through 1974. The Site includes some property currently
10 owned by the Burlington Northern and Santa Fe Railroad, Co. The Site is bounded on the east
11 and west by the innermost railroad track. The facility accepted waste from both the City of
12 Everett and from the rest of Snohomish County.

13 2. From 1977 through 1984, approximately 2 million tires were accumulated on
14 the Site by a tire chipping business. In 1983 and 1984, two fires occurred burning
15 approximately one million tires. The ash covered about 7 acres of the Site.

16 3. By letter dated August 23, 1989, Ecology notified the City of Everett of its
17 status as a "potentially liable person" for the Site under RCW 70.105D.040 after notice and
18 opportunity to comment.

19 4. The City of Everett is an "owner or operator" as defined by RCW
20 70.105D.020(12) of a "facility" as defined in RCW 70.105D.020(4).

21 5. The City of Everett has performed environmental investigations at the Site
22 pursuant to administrative orders issued by the Department of Ecology and conducted a
23 Remedial Investigation/Feasibility Study in 1994 and a Brownfield Feasibility Study in 2000
24 of the Site. These investigations are described more fully in the Brownfield Feasibility Study
25 and Chapter 2 of the Landfill Cleanup Action Plan (CAP) attached to this Decree as Exhibit C.

1 Based on these studies and additional background reports contained in Ecology's files,
2 Ecology finds as follows: The investigations have documented the "release", as defined in
3 RCW 70.105D.020(20) of hazardous substances into the environment. The City of Everett has
4 completed remedial actions at the Site consistent with the prior orders issued by Ecology.
5 These remedial activities have included installing a landfill cover, construction of a leachate
6 collection system and other actions. The work outlined in Section VI and the attached CAP,
7 including work already performed consistent with the CAP, is necessary and appropriate to
8 complete cleanup for existing Site conditions and to ensure that future uses will be consistent
9 with the cleanup requirements and be protective of human health and the environment.

10 6. The City of Everett intends to facilitate the redevelopment of the Site for uses
11 consistent with this Consent Decree, the attached CAP, and applicable City of Everett zoning
12 provisions and comprehensive plan designations.

13 VI. WORK TO BE PERFORMED

14 This Decree contains a program designed to protect public health, welfare and the
15 environment from the known release, or threatened release, of hazardous substances or
16 contaminants at, on, or from the Site. The requirements of this program are set forth in detail
17 in the Cleanup Action Plan (CAP) for Everett Landfill attached as Exhibit C, and the Scope of
18 Work and Schedule attached as Exhibit D. The Exhibits are incorporated by reference in this
19 Decree. The City of Everett shall complete the cleanup actions selected in the attached CAP
20 and Scope of Work and Schedule for existing conditions and any future redevelopment at the
21 Site.

22 The City of Everett agrees not to perform any remedial actions outside the scope of this
23 Decree that are substantial unless approved in writing by Ecology or the parties agree to amend
24 the Scope of Work to cover these actions. Nonsubstantial actions may occur if approved in
25

1 writing by Ecology. All work conducted under this Decree shall be done in accordance with
2 WAC Chapter 173-340 unless otherwise provided herein.

3 **VII. DESIGNATED PROJECT COORDINATORS**

4 The project coordinator for Ecology is:

5 Hao (Sunny) Lin
6 Department of Ecology
7 Northwest Regional Office
8 3190 160th Ave. S.E.
9 Bellevue, WA 980008-5452
10 Telephone: (425) 649-7187

11 The project coordinator for the City of Everett is:

12 Tom Thetford
13 City of Everett
14 Public Works Department
15 3200 Cedar Street
16 Everett, WA 98201-4599
17 Telephone: (425) 257-8824

18 Each project coordinator shall be responsible for overseeing the implementation of this
19 Decree. The Ecology project coordinator will be Ecology's designated representative at the
20 Site. To the maximum extent possible, communications between Ecology and the City of
21 Everett and all documents, including reports, approvals, and other correspondence concerning
22 the activities performed pursuant to the terms and conditions of this Decree, shall be directed
23 through the project coordinators. The project coordinators may designate, in writing, working
24 level staff contacts for all or portions of the implementation of the remedial work required by
25 this Decree. The project coordinators may agree to minor modifications to the work to be
performed without formal amendments to this Decree. Minor modifications will be
documented in writing by Ecology.

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

1 **VIII. PERFORMANCE**

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

9 **IX. ACCESS**

10 Ecology or any Ecology authorized representatives shall have the authority to enter and
11 freely move about all property at the Site at all reasonable times for the purposes of overseeing
12 and verifying remedial actions being performed, including, inter alia: inspecting records,
13 operation logs, and contracts related to the work being performed pursuant to this Decree;
14 reviewing the City of Everett's progress in carrying out the terms of this Decree; conducting
15 such tests or collecting such samples as Ecology may deem necessary; using a camera, sound
16 recording, or other documentary type equipment to record work done pursuant to this Decree;
17 and verifying the data submitted to Ecology by the City of Everett. Without limitation on
18 Ecology's rights under this Section, Ecology will provide the City of Everett advance notice of
19 its entry onto the Site when feasible. All parties with access to the Site pursuant to this
20 paragraph shall comply with approved health and safety plans and all applicable federal and
21 state safety and health requirements.

22 **X. SAMPLING, DATA REPORTING, AND AVAILABILITY**

23 With respect to the implementation of this Decree, the City of Everett shall make the
24 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf
25 available to Ecology.

1 In accordance with WAC 173-340-840(5), ground water sampling data shall be
2 submitted pursuant to the Compliance Monitoring and Contingency Plan (CMCP), which is an
3 attachment to the CAP (Exhibit C).

4 If requested by Ecology, the City of Everett, or its Successors in Interest and Assigns,
5 shall allow split or duplicate samples to be taken by Ecology and/or its authorized
6 representatives of any samples collected by the City of Everett pursuant to the implementation
7 of this Decree. The City of Everett shall notify Ecology seven (7) days in advance of any
8 sample collection or work activity at the Site. Ecology shall, upon request, allow split or
9 duplicate samples to be taken by the City of Everett or its Successors in Interest and Assigns,
10 or its authorized representatives, of any samples collected by Ecology pursuant to the
11 implementation of this Decree provided it does not interfere with the Department's sampling.
12 Without limitation on Ecology's rights under Section IX, Access, Ecology shall endeavor to
13 notify the City of Everett prior to any sample collection activity.

14 **XI. MONITORING REPORTS**

15 The City of Everett shall submit monitoring reports to Ecology summarizing the results
16 of required monitoring and describing any issues that have arisen regarding implementation
17 and maintenance of the Cleanup Action Plan pursuant to the CMCP.

18 **XII. RETENTION OF RECORDS**

19 The City of Everett shall preserve, during the pendency of this Decree and for ten (10)
20 years from the date this Decree is no longer in effect as provided in Section XXV, all records,
21 reports, documents, and underlying data in its possession relevant to the implementation of this
22 Decree and shall insert in contracts with project contractors and subcontractors a similar record
23 retention requirement. Upon request of Ecology, the City of Everett shall make all non-
24 archived records available to Ecology and allow access for review. All archived records shall
25 be made available to Ecology within a reasonable period of time.

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

2 A. Everett shall not consummate any conveyance of title, easement, lease or other
3 interest in the Site without adequate and complete provision for the continued operation,
4 maintenance and monitoring of the cleanup action undertaken pursuant to this Decree. Everett
5 shall restrict leases to uses and activities consistent with this Consent Decree and notify all
6 lessees of the restrictions on the use of the property.

7 B. During the Effective Period of this Decree, as defined in Section XXV, Everett
8 shall notify Ecology of its intent to convey any interest in the Site.

9 C. This Consent Decree was not based on circumstances unique to the City of
10 Everett as defined in RCW 70.105D.040(4)(e). RCW 70.105D.040(4)(e), as found in MTCA
11 as of the effective date of this Consent Decree, will apply to any owner or operator who is a
12 successor in interest to the City of Everett if all statutory provisions are met.

13 **XIV. RESOLUTION OF DISPUTES**

14 A. In the event a dispute arises as to an approval, disapproval, proposed
15 modification or other decision or action by Ecology's project coordinator, the parties shall
16 utilize the dispute resolution procedure set forth below.

17 1. Upon receipt of the Ecology project coordinator's decision, the City of
18 Everett shall have fourteen (14) days within which to notify Ecology's project coordinator of
19 its objection to the decision.

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

23 3. The City of Everett may then request Ecology management review of
24 the decision. This request shall be submitted in writing to the Toxics Cleanup Program
25 Manager within seven (7) days of receipt of Ecology's project coordinator's decision.

1 become effective upon entry by the Court. Agreement to amend shall not be unreasonably
2 withheld by any party to the Decree.

3 B. The City of Everett shall submit any request for an amendment to Ecology for
4 approval. Ecology shall indicate its approval or disapproval in a timely manner after the
5 request for amendment is received. If the amendment to the Decree is substantial, Ecology
6 will provide public notice and opportunity for comment. Reasons for the disapproval shall be
7 stated in writing. If Ecology does not agree to any proposed amendment, the disagreement
8 may be addressed through the dispute resolution procedures described in Section XIV of this
9 Decree.

10 **XVI. EXTENSION OF SCHEDULE**

11 A. An extension of the schedule shall be granted only when a request for an
12 extension is submitted in a timely fashion, generally at least thirty (30) days prior to expiration
13 of the deadline for which the extension is requested, and good cause exists for granting the
14 extension. In addition, an extension of schedule shall be granted if Ecology's entry onto the
15 Site under Section IX interferes with the City of Everett's performance of work required under
16 this Decree. A request for an extension may be deemed timely if submitted fewer than thirty
17 (30) days prior to the deadline if the City of Everett could not reasonably have anticipated the
18 need for an extension earlier. All extensions shall be requested in writing. The request shall
19 specify the reason(s) the extension is needed.

20 An extension shall only be granted for such period of time as Ecology determines is
21 reasonable under the circumstances. A requested extension shall not be effective until
22 approved by Ecology or the Court. Ecology shall act upon any written request for extension in
23 a timely fashion, preferably within fifteen (15) days of receipt of the request. It shall not be
24 necessary to formally amend this Decree pursuant to Section XV when a schedule extension is
25 granted.

1 B. The burden shall be on the City of Everett to demonstrate to the satisfaction of
2 Ecology that the request for such extension has been submitted in a timely fashion and that
3 good cause exists for granting the extension. Good cause includes, but is not limited to, the
4 following:

5 1. Circumstances beyond the reasonable control and despite the due
6 diligence of the City of Everett, including delays caused by unrelated third parties or Ecology,
7 such as (but not limited to) delays by Ecology in reviewing, approving, or modifying
8 documents submitted by the City of Everett; or

9 2. Acts of God, including fire, flood, blizzard, extreme temperatures,
10 storm, or other unavoidable casualty; or

11 3. Endangerment as described in Section XVII.

12 However, neither increased costs of performance of the terms of the Decree nor
13 changed economic circumstances shall be considered circumstances beyond the reasonable
14 control of the City of Everett.

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

17 1. Delays in the issuance of a necessary permit which was applied for in a
18 timely manner; or

19 2. Other circumstances deemed exceptional or extraordinary by Ecology;

20 or

21 3. Endangerment as described in Section XVII.

22 Ecology shall give the City of Everett written notification in a timely fashion of any
23 extensions granted pursuant to this Decree.

1 **XVII. ENDANGERMENT**

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

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

1 Section XVI of this Decree, for such period of time as Ecology determines is reasonable under
2 the circumstances. Any disagreements pursuant to the clause shall be resolved through the
3 dispute resolution procedures in Section XIV.

4 **XVIII. INDEMNIFICATION**

5 The City of Everett agrees to indemnify and save and hold the State of Washington, its
6 employees, and agents harmless from any and all claims or causes of action for death or
7 injuries to persons, or loss or damage to property arising from or on account of acts or
8 omissions of the City of Everett, its officers, employees, agents, or contractors in entering into
9 and implementing this Decree. However, the City of Everett shall not indemnify the State of
10 Washington nor save nor hold its employees and agents harmless from any claims or causes of
11 action arising out of the negligent acts or omissions of the State of Washington, or the
12 employees or agents of the State, in implementing the activities pursuant to this Decree.

13 **XIX. DISCLAIMER**

14 This Decree does not constitute a representation by the State of Washington that the
15 Site is fit for any particular purpose.

16 **XX. COMPLIANCE WITH APPLICABLE LAWS**

17 A. All actions carried out by the City of Everett pursuant to this Decree shall be
18 done in accordance with all applicable federal, state, and local requirements, including
19 requirements to obtain necessary permits, except as provided in paragraph B of this Section.

20 B. Pursuant to RCW 70.105D.090(1), the known and substantive requirements of
21 chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or
22 authorizing local government permits or approvals for the remedial action under this Decree
23 that are known to be applicable at the time of entry of the Decree have been included in the
24 CAP (Exhibit C, and are binding and enforceable requirements of the Decree.

1 Defendant has a continuing obligation to determine whether additional permits or
2 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
3 action under this Decree. In the event either Ecology or the City of Everett determines that
4 additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be
5 required for the remedial action under this Decree, it shall promptly notify the other party of
6 this determination. Ecology shall determine whether Ecology or the City of Everett shall be
7 responsible to contact the appropriate state and/or local agencies. If Ecology so requires, the
8 City of Everett shall promptly consult with the appropriate state and/or local agencies and
9 provide Ecology with written documentation from those agencies of the substantive
10 requirements those agencies believe are applicable to the remedial action. Ecology shall make
11 the final determination on the additional substantive requirements that must be met by the City
12 of Everett and on how the City of Everett must meet those requirements. Ecology shall inform
13 the City of Everett in writing of these requirements. Once established by Ecology, the
14 additional requirements shall be enforceable requirements of this Decree. The City of Everett
15 shall not begin or continue the remedial action potentially subject to the additional
16 requirements until Ecology makes its final determination.

17 Ecology shall ensure that notice and opportunity for comment is provided to the public
18 and appropriate agencies prior to establishing the substantive requirements under this Section.

19 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
20 exemption from complying with the procedural requirements of the laws referenced in RCW
21 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary
22 for the State to administer any federal law, the exemption shall not apply and the City of
23 Everett shall comply with both the procedural and substantive requirements of the laws
24 referenced in RCW 70.105D.090(1), including any requirements to obtain permits.
25

1 circumstances. At least every five years the parties shall meet to discuss the status of the Site
2 and the need, if any, of further remedial action at the Site. Ecology reserves the right to require
3 further remedial action at the Site under appropriate circumstances. This provision shall
4 remain in effect for the duration of the Decree.

5 **XXIV. PUBLIC PARTICIPATION**

6 Ecology shall maintain the responsibility for public participation at the Site regarding
7 the remedial action under the CAP. However, the City of Everett shall cooperate with Ecology
8 and, if agreed to by Ecology, shall:

9 A. Prepare drafts of public notices and fact sheets at important stages of the
10 remedial action, such as the submission of work plans, Remedial Investigation/Feasibility
11 Study reports and engineering design reports. Ecology will finalize (including editing if
12 necessary) and distribute such fact sheets and prepare and distribute public notices of Ecology's
13 presentations and meetings;

14 B. Notify Ecology's project coordinator prior to the preparation of all press releases
15 and fact sheets, and before major meetings with the interested public and local governments
16 regarding the cleanup action as required under the CAP. Likewise, Ecology shall notify the
17 City of Everett prior to the issuance of all press releases and fact sheets, and before major
18 meetings with the interested public and local governments;

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

22 D. In cooperation with Ecology, arrange and/or continue information repositories
23 to be located at the City of Everett and Ecology's Northwest Regional Office at 3190 - 160th
24 Avenue SE, Bellevue, WA 98008-5452. At a minimum, copies of all public notices, fact
25 sheets, and press releases; all quality assured ground water, surface water, soil sediment, and

1 air monitoring data; remedial actions plans, supplemental remedial planning documents, and
2 all other similar documents relating to performance of the remedial action required by this
3 Decree shall be promptly placed in these repositories.

4 E. This Section applies only to public participation required under MTCA related
5 to cleanup, monitoring and other actions addressed in this Decree and the CAP. It does not
6 apply to redevelopment, zoning or other activities of the City of Everett at the Site.

7 **XXV. DURATION OF DECREE**

8 This Decree shall remain in effect and the remedial program described in the Decree
9 shall be maintained and continued until the City of Everett has received written notification
10 from Ecology that the requirements of this Decree have been satisfactorily completed. The
11 Decree shall remain in effect until the City of Everett has received written notification from
12 Ecology that the requirements of this Decree have been satisfactorily completed. Ecology shall
13 provide such written notification or notice of any deficiencies in the completion of the
14 requirements of this Decree within sixty (60) days of receiving notice from the City of Everett
15 that the requirements of this Decree have been satisfied. Within sixty (60) days of the City of
16 Everett's written notice that any noted deficiencies have been corrected, Ecology shall provide
17 written notification that the requirements of the Decree have been satisfied or notice of any
18 deficiencies that still remain. The provision set forth in Section XXVII (Contribution
19 Protection); Section XXVIII (Covenant Not to Sue), Section XVIII (Indemnification) and such
20 other continuing rights of the City of Everett or Ecology under this Decree shall survive the
21 termination of this Decree pursuant to this paragraph. This Decree shall in no way limit the
22 authority of Ecology to obtain all legal or equitable remedies available against persons not
23 party to this Decree and against all persons, parties or non-parties, for releases of hazardous
24 substances at the Site not addressed by this Decree.

1 Certifications by Ecology. The City of Everett Property may be redeveloped in phases.
2 The City of Everett may from time to time provide notice and demonstrate to Ecology that it
3 has attained cleanup levels for certain media in certain parts of the Property. In order to
4 facilitate the timely redevelopment of the Property, Ecology shall, within a reasonable time of
5 receiving such notice and adequate documentation (including, but not limited to, design reports
6 and monitoring results), certify in writing that cleanup levels have been met in portions of the
7 Property specifically requested. In addition to these certifications, Ecology shall within a
8 reasonable time of receiving notice from the City of Everett that it has satisfactorily completed
9 work, certify in writing that the City of Everett has completed all cleanup activities that are
10 required pursuant to the CAP, with the exception of any required institutional controls and
11 monitoring as described in the CAP.

12 **XXVI. CLAIMS AGAINST THE STATE**

13 The City of Everett and its Successors in Interest and Assigns, hereby agrees that it will
14 not seek to recover any costs accrued in implementing the remedial action required by this
15 Decree from the State of Washington or any of its agencies; and further, that the City of
16 Everett or its Successors in Interest and Assigns will make no claim against the State Toxics
17 Control Account or any Local Toxics Control Account for any costs incurred in implementing
18 this Decree. Except as provided above, however, the City of Everett or its Successors in
19 Interest and Assigns expressly reserves its right to seek to recover any costs incurred in
20 implementing this Decree from any other potentially liable person. Nothing in this paragraph
21 shall preclude the City of Everett from applying for State Toxics Control Account or any Local
22 Toxics Control Account funding in the future.

1 **XXVII. CONTRIBUTION PROTECTION**

2 With regard to claims for contribution against the City of Everett for matters addressed
3 in this Decree, the City of Everett is entitled to protection from contribution actions or claims
4 as is provided by MTCA, RCW 70.105D.040, or as otherwise provided by law.

5 **XXVIII. COVENANT NOT TO SUE**

6 A. In consideration of the City of Everett's compliance with the terms and
7 conditions of this Decree, Ecology agrees that compliance with this Decree shall stand in lieu
8 of any and all administrative, legal, and equitable remedies and enforcement actions available
9 to Ecology against the City of Everett for the release or threatened release of known hazardous
10 substances addressed pursuant to this Consent Decree and the CAP. For purposes of this
11 paragraph, "known hazardous substances" shall include the hazardous substances identified in
12 the Brownfield Feasibility Study conducted at this Site (RI/FS), which are described in the
13 CAP and Paragraph V.5 of the Decree.

14 1. REOPENER: Ecology specifically reserves the right to institute legal or
15 administrative action against the City of Everett following twenty (20) days written notice to
16 Everett, seeking to require it to perform additional remedial action at the facility, and to pursue
17 appropriate cost recovery in accordance with provisions set out in RCW 70.105D.050, under
18 the following requirements:

19 (a) In the event that the City of Everett fails to comply with the
20 terms and conditions of this Decree, including all exhibits.

21 (b) In the event new information becomes available regarding
22 factors not known at the time of entry of this Decree which present a previously unknown
23 threat to human health or the environment, and Ecology determines, in light of this
24 information, that further remedial action is necessary at the facility to protect human health or
25

1 the environment, and the City of Everett, after notice from Ecology, fails to take necessary
2 action within a reasonable time.

3 (c) In the event conditions at the facility cause an endangerment to
4 human health or the environment under Section XVII of the Decree, and the City of Everett,
5 after notice from Ecology, fails to eliminate the endangerment within a reasonable time.

6 (d) To the extent the City of Everett exacerbates the known,
7 documented contamination described in this Decree and the CAP;

8 (e) In the event the City of Everett interferes with any remediation
9 of the facility conducted or required by Ecology.

10 2. APPLICABILITY: The Covenant Not to Sue set forth above shall have
11 no applicability whatsoever to:

12 (a) Criminal Liability;

13 (b) Liability for damages to natural resources; or

14 (c) Any Ecology action against potentially liable parties not a party
15 to this Decree, including cost recovery.

16 XXIX. LAND USE RESTRICTIONS

17 A. For all property within the Site owned by the City of Everett, the City of Everett
18 agrees to record the Restrictive Covenant (Exhibit F) with the office of the Snohomish County
19 Auditor within twelve (12) months of the entry of this Decree. The Restrictive Covenant shall
20 restrict future users of the Site. The City of Everett will provide Ecology with a copy of the
21 recorded Restrictive Covenant within thirty (30) days of the recording date.

22 B. For those properties within the Site not owned by the City of Everett where
23 residual concentrations of hazardous substances for which cleanup levels have been established
24 in the CAP will exceed residential cleanup levels following completion of the cleanup action,
25 the City of Everett will use its best efforts to obtain a recorded restrictive covenant that fulfills

1 the requirements of WAC 173-340-440 within eighteen (18) months from the date of entry of
2 this Decree. If the City of Everett obtains a restrictive covenant for these properties, then the
3 City of Everett agrees to record the restrictive covenant with the office of the Snohomish
4 County Auditor. The City of Everett will provide Ecology with a copy of the recorded
5 restrictive covenant within thirty (30) days of the recording date.

6 If after eighteen (18) months, the City of Everett has failed to record a restrictive
7 covenant that fulfills the requirements of WAC 173-340-440 for these properties despite the
8 use of best efforts, then the City of Everett may request Ecology's assistance in obtaining a
9 restrictive covenant for these properties. The City of Everett may request Ecology's assistance
10 prior to eighteen (18) months from the date of this entry of this Decree if the City of Everett
11 can show that it used best efforts to obtain a recorded restrictive covenant and that further
12 efforts are not likely to be successful. In providing assistance to the City of Everett, Ecology
13 will undertake all reasonable efforts to facilitate the recording of the restrictive covenant
14 pursuant to Chapter 173-340 WAC. The City of Everett's use of best efforts to obtain a
15 restrictive covenant for these properties will satisfy its obligations under this subparagraph.

16 **XXX. EFFECTIVE DATE**

17 This Decree is effective upon the date it is entered by the Court.


18 **XXXI. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

19 This Decree has been the subject of public notice and comment under RCW
20 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to
21 a more expeditious cleanup of hazardous substances at the Site.

22 If the Court withholds or withdraws its consent to this Decree, it shall be null and void
23 at the option of any party and the accompanying Complaint shall be dismissed without costs
24 and without prejudice. In such an event, no party shall be bound by the requirements of this
25 Decree.

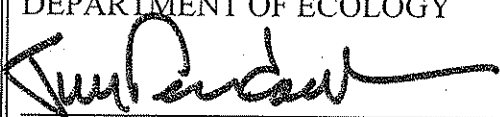
1 The undersigned parties enter into this Consent Decree on the date specified below.


2 SO ORDERED this _____ day of APR 02 2001 2000.

3
4
5 
6 ~~JUDGE~~ _____
Snohomish County Superior Court

7 STATE OF WASHINGTON
8 DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

9 
10 JIM PENDOWSKI
Program Manager, Toxics Cleanup Program

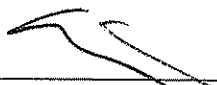
11 
12 MARY SUE WILSON, WSBA #19257
Assistant Attorney General

13 DATE: 3/7/01

DATE: 3/7/01

14 CITY OF EVERETT

PRESTON GATES & ELLIS, LLP

15 
16 MARK SOINE, WSBA #06664
City Attorney, for the City of Everett

17 
18 ROSS A. MACFARLANE, WSBA #14863
Attorneys for Defendant the City of Everett

19 DATE: 3/1/01

20 DATE: 2/28/01

EXHIBIT F

Restrictive Covenant
Everett Landfill

This Declaration of Restrictive Covenant is made this _____ day of _____, 2000, by the City of Everett ("Everett"), the fee title owner of the real property described herein, in favor of the Washington State Department of Ecology ("Ecology").

The property that is the subject of this Restrictive Covenant (hereinafter referred to as the "Property") has been the subject of remedial action under the Washington State Model Toxics Control Act ("MTCA"), Chapter 70.105D RCW. This Restrictive Covenant is required by WAC 173-340-440 to assure the continued implementation of this remedial action. The remedial action undertaken to clean up the Property (hereinafter the "Cleanup Action") is described in the Cleanup Action Plan ("CAP") for the Everett Landfill/Tire Fire Site. The CAP and Restrictive Covenant are attachments C and F respectively to the Consent Decree entered into by Ecology and Everett on _____ relating to this Property.

The Property is the former Everett Landfill and is located at 2902-36th Street East in Everett, Washington. The Property is further described in Exhibit A and B to the Consent Decree.

The purpose of this Restrictive Covenant is to provide Ecology the right to ensure that the Property will not be used in a manner inconsistent with the restrictions stated herein or in a manner that would pose a threat to human health or the environment. It is the further purpose of this Restrictive Covenant to provide Ecology the right to determine whether and to what extent the deed restrictions set forth below may be removed from all or any portion of the Property, consistent with the Cleanup Action Plan.

Everett makes the following declarations as to limitations, restrictions, and uses to which the Property may be put, and specifies that such declarations shall constitute covenants to run with the land, as provided by law, and shall be binding on Everett and its successors or assigns:

Section 1: The owner of the Property shall adhere to the requirements of the Consent Decree and Cleanup Action Plan. Any activity on the Property that may interfere with the Cleanup Action or that may result in an endangerment to human health or the environment resulting from hazardous substances contained on the Property or from gas generated from the Property is prohibited. This restriction recognizes that maintenance or construction activities at the Property conducted in accordance with CAP requirements, requiring replacement of portions of the landfill cover or other systems, including constructing foundations or other structures, or installing or maintaining utilities, shall not constitute activities that interfere with the Cleanup Action.

Section 2: Pursuant to the Cleanup Action Plan, the owner of the Property must maintain landfill cover, site access controls and leachate collection systems, and must install, operate, and maintain the surface water drainage systems and the gas management systems, until such time as Ecology determines, pursuant to the Consent Decree and Section 9 of this Restrictive Covenant, that cleanup standards have been achieved or that the Cleanup Action is no longer necessary or appropriate.

Section 3: Future use of the Property shall be limited to commercial, industrial, office, mixed use, recreational, multi-family residential (upper levels only) or public access uses as those uses are defined in MTCA and the City of Everett Zoning Code and Comprehensive Plan. Overnight camping shall not be permitted. The owner must notify and obtain approval from Ecology, or from a successor agency, prior to any use of the Property that is inconsistent with this Section. Ecology, or its successor agency, may approve such a use only after public notice and comment.

Section 4: The owner shall not consummate any conveyance of title, easement, lease or other interest in the Property without adequate and complete provision for the continued operation, maintenance and monitoring of the Cleanup Action undertaken pursuant to the Consent Decree. The owner shall restrict leases to uses and activities consistent with the Consent Decree and notify all lessees of the restrictions on the use of the property.

Section 5: During the Effective Period of the Consent Decree, the owner shall notify Ecology of its intent to convey any interest in the Property.

Section 6: Ecology or any Ecology authorized representatives shall have the authority to enter and freely move about the Property at all reasonable times for the purposes of overseeing and verifying remedial actions being performed, including, *inter alia*: inspecting records, operation logs, and contracts related to the work being performed pursuant to the Consent Decree; reviewing the owner's progress in carrying out the terms of the Consent Decree; conducting such tests or collecting such samples as Ecology may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to the Consent Decree; and verifying the data submitted to Ecology by the owner.

Section 7: No groundwater may be withdrawn from the Property for any purpose except groundwater monitoring or leachate collection.

Section 8: Workers temporarily penetrating landfill cover materials on the Property must comply with OSHA and WSHA health and safety regulations. Uncontrolled penetration of landfill cover materials without notification of CAP requirements is prohibited.

Section 9. The owner of the Property reserves the right under WAC 173-340-440 (1996 ed.), to record an instrument which provides that this Restrictive Covenant shall no longer limit use of the Property or be of any further force or effect. However, such an instrument may be recorded only with the consent of Ecology, or a successor agency. Ecology or a successor agency may consent to the recording of such an instrument only after public notice and comment.

Section 10: Everett reserves unto itself, its successors or assigns, all rights and privileges in and to the use of the Property that are not incompatible with the restrictions and rights granted herein.

Signature

Printed Name