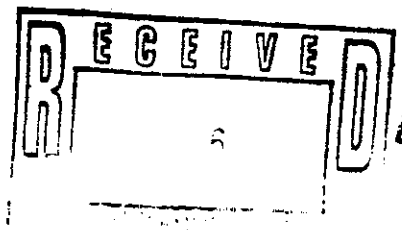
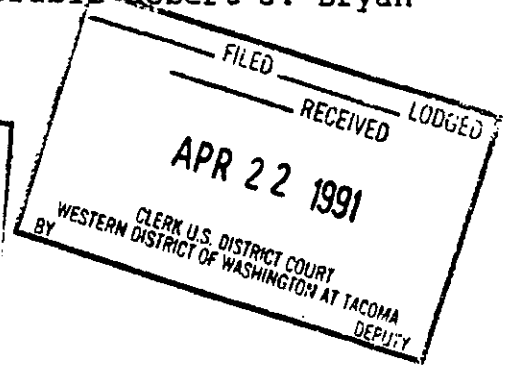
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The Honorable Robert J. Bryan





UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BURLINGTON NORTHERN RAILROAD CO., a foreign corporation, Plaintiff, v. WASHINGTON NATURAL GAS COMPANY, a Washington corporation; and JOSEPH SIMON & SONS, et al., Defendants.	No. C89-155TB MEMORANDUM OF UNITED STATES IN SUPPORT OF MOTION TO ENTER PARTIAL CONSENT DECREES FOR DE MINIMIS SETTLEMENTS
UNTIED STATES OF AMERICA, Plaintiff, v. JOSEPH SIMON & SONS, INC., et al. Defendants.	No. C90-5373B

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I. INTRODUCTION

The United States of America (United States) has filed this action (No. C90-5373B) pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, et seq., to protect the public and the environment from the dangers posed by contamination at the Tacoma Tar Pits Site (Site).

The United States and ten of the defendants in this action have entered into two partial consent decrees for de minimis settlements. These consent decrees will resolve several CERCLA claims for the Site. Both the "Utility Decree," which was signed by six electric utility defendants (Utilities),[1] and the "Landowner Decree," which was signed by four property-owner defendants (Landowners),[2] were lodged with this Court on September 11, 1990. This memorandum is submitted by the United States in support of its motion to enter these de minimis consent decrees.

Pursuant to Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7, notice of lodging of the

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[1] Puget Sound Power and Light Company; Public Utility District No. 1 of Chelan County; Public Utility District No. 1 of Douglas County; City of Seattle, City Light Department; City of Tacoma, Department of Public Utilities, Light Division; and Lewis County Public Utility District No. 1.

[2] City of Tacoma; Hygrade Food Products Corporation; Larry J. Hansen; and John D. Simchuck.

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consent decrees was published on October 4, 1990, 55 Fed. Reg. 40,730, and public comments were solicited through November 4, 1990. A copy of the public comments is included in the "Administrative Record,"[3] (Ad. Rec.) which accompanies this memorandum as Exhibit 1.[4] The United States Environmental Protection Agency (EPA) has addressed the public comments in the "Responsiveness Summary," (Resp. Sum.) which is included as Exhibit 2. After careful consideration of all of the comments, EPA and the Attorney General find no basis to withdraw or withhold consent to the proposed settlements. The comments received do not disclose that the proposed settlements are inappropriate, improper or inadequate. 42 U.S.C. § 9622(d)(2)(B).[5] Accordingly, the United States requests that this Court enter the de minimis partial consent decrees.

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[3] Ad. Rec. at 1.6-0001 to -0003.

[4] The Administrative Record comprises all documents in the possession of the United States which are relevant to the de minimis settlements. The Administrative Record has been available to all parties in this matter since October 4, 1990. Most of these parties, including Washington Natural Gas Company (WNG) and Joseph Simon & Sons, Inc. (Simon), obtained copies of desired documents from the Administrative Record during the public comment period. WNG and Simon have also been provided copies of documents included in the Administrative Record subsequent to the close of the public comment period. Since it would be expensive, burdensome, and repetitive for the United States to again produce copies of Exhibit 1 (the Administrative Record) to all parties, the United States has provided one copy of the Administrative Record to the Court, and has retained another copy, which continues to be available at EPA for review and copying by the parties and public.

[5] Resp. Sum. §§ I & VIII.

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II. FACTUAL BACKGROUND

The Site is part of the Commencement Bay Nearshore Tideflats facility, which has been placed on the National Priorities List by EPA, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605. Complaint at ¶¶ 20 & 24. The Site covers an area of approximately 30 acres in an industrial section of Tacoma, Washington. Id. at ¶ 18. From 1924 to 1956, a coal gasification plant was operated on the Site by Washington Natural Gas Company (WNG), a defendant in this action. Id. at ¶¶ 15 & 17. Waste material from the plant, including coal tar, was deposited on-Site resulting in the "tar pits" which are still present today. Id. at ¶¶ 19 & 21.

From 1967 to the present, a metal recycling business has been operated at the Site by Joseph Simon and Sons, Inc. (Simon), another defendant in this action. Id. at ¶¶ 16 & 17. The recycling business included the disassembling of appliances, automobiles, batteries, transformers, and other materials as part of its operations. Resp. Sum. at 5. As a result of these activities, oils, acids and other liquids have been deposited directly on-Site. Id. In addition, Simon placed fill material consisting mainly of shredded appliances and car interiors (shredder fluff) over the soil in the western and southern portions of the Site. Id. at 6.

The Site is heavily contaminated with hazardous substances, including, but not limited to, polynuclear aromatic hydrocarbons

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(PAHs), polychlorinated biphenyls (PCBs), benzene, lead, and other heavy metals. Complaint at ¶ 19. In early 1984, EPA initiated negotiations with five potentially responsible parties (PRPs), seeking to have these parties perform a remedial investigation and feasibility study (RI/FS) of the Site. The negotiations were initially unsuccessful in achieving an agreement, and EPA undertook to prepare the RI/FS itself in September 1984. Soon after EPA began these activities, however, an agreement was reached with four of the five PRPs,[6] who then conducted the RI/FS pursuant to an administrative order on consent. Id. at ¶ 25. The RI/FS was completed in October 1987, and EPA issued a Record of Decision (ROD) on December 30, 1987, setting forth the selected remedy for cleanup of the Site. Id. at ¶ 26.

In April 1988, EPA issued "special" notice letters to fourteen PRPs pursuant to Section 122(e) of CERCLA, 42 U.S.C. § 9622(e). These letters initiated a moratorium on EPA action, during which representatives from EPA, the Department of Justice (DOJ), and the PRPs attempted to reach agreement over implementation of the remedy and payment of government response costs.

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[6] WNG; Simon; Hygrade Food Products Corporation (Hygrade); and Burlington Northern Railroad Company (BN). Union Pacific Railroad Company (UP) refused to participate in the RI/FS.

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During the moratorium, twelve of the PRPs[7] requested the opportunity to enter into de minimis settlements pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g). In support of these requests, the PRPs submitted information in an effort to satisfy the statutory prerequisites for a obtaining a de minimis settlement. EPA also solicited information from WNG and Simon regarding the proposed de minimis settlements. In addition, EPA provided WNG and Simon copies of all documents in the possession of EPA pertaining to the de minimis proposals.[8]

EPA evaluated all of the information received, and determined that the twelve PRPs satisfied the statutory criteria for a de minimis settlement. The PRPs were divided into two groups for purposes of settlement, with one group consisting of the Utilities who had sold transformers to Simon, and the second group consisting of the parties who own a parcel of contaminated property which is contained within the boundaries of the Site.

The information available to EPA indicated that the Utilities contributed hazardous substances to the Site which, with regard to amount and toxic or other hazardous effects, were

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[7] The twelve PRPs included the Utilities named in footnote 1, as well as the Landowners named in footnote 2. In addition, BN and UP submitted proposals for de minimis settlements.

[8] EPA has continually provided such information to WNG and Simon, and has carefully reviewed the submittals of these parties throughout the 3 year process for the de minimis settlements. EPA followed this procedure in order to allow WNG and Simon the fullest opportunity to be heard on these issues.

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minimal in comparison to other hazardous substances at the Site. See 42 U.S.C. § 9622(g)(1)(A). The Landowners, BN, and UP submitted information indicating that they did not conduct, permit, or contribute to the disposal or release of hazardous substances on their respective parcels of property, and did not know of such disposal or release at the time they each purchased their property. See 42 U.S.C. § 9622(g)(1)(B). As a result, partial consent decrees for de minimis settlements were negotiated with the two groups. The provisions of these decrees are discussed in section IV, infra.

In addition to the two partial consent decrees for de minimis settlements, EPA and DOJ engaged in lengthy negotiations with the two owners and operators of the Site, WNG and Simon. A consent decree was negotiated which would have required WNG and Simon to implement the remedy, and reimburse the United States for all future governmental response costs. Since the two partial de minimis consent decrees required reimbursement of all past response costs, the consent decree with WNG and Simon did not address these costs.

EPA and DOJ diligently negotiated in good faith with WNG and Simon for well over one year in an effort to settle all of the claims of the United States in this matter. Lodging of the partial consent decrees for de minimis settlement was delayed in anticipation of simultaneously lodging these decrees along with the WNG and Simon consent decree, and thereby achieving a

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comprehensive settlement of this entire matter.

EPA forwarded a final draft consent decree to WNG and Simon for their review and signature on three separate occasions. Although an agreement in principle had been reached with WNG and Simon, neither of these parties ever returned a signed consent decree to the United States. When it became clear that a comprehensive settlement of this matter was not possible, the United States moved forward with the two partial de minimis consent decrees. Unfortunately, a vast amount of time had been lost as a result of the unsuccessful efforts to conclude a consent decree with WNG and Simon.

In November 1989, the United States was prepared to lodge the partial consent decrees for de minimis settlements. However, at this same time, EPA received information from WNG and Simon indicating that there had been a significant increase in the estimated cost for the remedy. Resp. Sum. at 15. Since the amounts to be paid by the de minimis parties were predicated on an estimate of the total response costs for the Site, lodging of the de minimis consent decrees was again delayed while EPA sought to ascertain whether the new information supplied by WNG and Simon was correct.

In December 1989, EPA confirmed that, largely due to an increase in the estimated area of remediation at the Site, the total response costs had increased from the approximately $5,000,000.00, as estimated in 1988, to approximately

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$15,000,000.00. As a result of this significant increase, the United States determined that the amount to be paid by the de minimis parties had to be renegotiated to reflect a fair and proportionate share of the newly estimated total response costs. Accordingly, increased payment amounts were negotiated with ten of the twelve PRPs.[9]

The partial consent decrees, which were lodged with this Court on September 11, 1990, are identical to the original consent decrees, except for the amount to be paid, and the deletion of two of the Landowner defendants, BN and UP, determined, on the basis of the new information, to no longer qualify for a de minimis settlement.[10]

III. ARGUMENT

A. Public Policy Favors CERCLA Settlements

"Public policy strongly favors settlements of disputes without litigation." Aro Corp. v. Allied Witan Co., 531 F.2d

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[9] EPA received information subsequent to negotiation of the original consent decree with the Landowners indicating that BN no longer satisfied the criteria necessary for obtaining a de minimis settlement. In addition, UP would not agree to pay an increased amount toward settlement. As a result, BN and UP were no longer offered a de minimis settlement. Sometime thereafter, EPA was informed that UP may have contributed hazardous substances to the Site. This information, if correct, would eliminate UP from consideration for a de minimis property-owner settlement.

[10] EPA evaluated well over 3,000 pages of documentation provided by the Utilities, Landowners, WNG, Simon, BN, and UP, in an effort to properly effectuate the statutory requirements of CERCLA by providing a thorough, fair, and comprehensive analysis of the appropriateness of these settlements.

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1368, 1372, (6th Cir.), cert. denied, 429 U.S. 862 (1976). As the court in Aro stated:

> Settlement agreements should . . . be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.

531 F.2d at 1372. See also Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (upholding entry of consent decree under the Clean Water Act), cert. denied sub nom, Union Carbide Corp. et al. v. Natural Resources Defense Counsel, Inc., et al., 467 U.S. 1219 (1984).

The consent decree is a "highly useful tool for government agencies," for it "maximizes the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975); see also Securities and Exchange Commission v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) ("use of consent decrees encourages informal resolution of disputes, thereby lessening the risks and cost of litigation"); United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp. 1067, 1080 (W.D.N.Y. 1982) (approving CERCLA decree will save "considerable time, money and effort in litigation"); Moch v. East Baton Rouge Parish School Board, 533 F. Supp. 557, 559 (M.D. La. 1980) (consent decree is "a useful tool for federal governmental agencies who are charged

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with enforcing particularly the civil rights laws . . . since the government itself may avoid the risks as well as the cost of full scale litigation").

B. Standard of Review

The general standard of review which Courts have applied in reviewing consent decrees is whether these settlements are "fair, adequate, and reasonable." Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3rd Cir. 1983). "Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved." Randolph, 736 F.2d at 529. Although review of the consent decrees is committed to the informed discretion of the trial judge, see, e.g., United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985) ("test for affirmance [of CERCLA consent decree]. . . is abuse of discretion" [bracketed material supplied]);[11] Officers for Justice v. Civil Service Commission, 688 F.2d 615, 625-26 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983), this discretion

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[11] See also Wiener v. Roth, 791 F.2d 661, 662 (8th Cir. 1986) (view of district court judge in approving consent decree accorded great weight because "he is exposed to the litigants, and their strategies, positions and proofs"); In re Flight Transp. Corp. Securities Litigation, 730 F.2d 1128 1135 (8th Cir. 1984) (same ruling), cert. denied, 469 U.S. 1207 (1985); Worthy v. McKesson, 756 F.2d 1370, 1372 (8th Cir. 1985) (district court's approval of consent decree affirmed because plaintiff failed to show any of the district court's findings of fact were clearly erroneous); City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974) (Court of Appeals "will intervene in a judicially approved settlement only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion").

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should be exercised to further the strong policy favoring voluntary settlement of litigation. Id. (in CERCLA cases there is a "well-established policy of encouraging settlements"). See also Gorsuch, 718 F.2d at 1126 ("trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate").

Although a consent decree, as a judicial act, requires approval, "the court's role is a limited one." United States v. McGraw-Edison, 718 F. Supp. 154, 158 (W.D.N.Y. 1989); Harris v. Pernsley, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987), aff'd 820 F.2d 592 (3d Cir. 1987), cert. denied sub nom, Catille v. Harris, __ U.S. __, 108 S.Ct. 336 (1987). The court may either approve or disapprove the settlement; it may not rewrite it. See Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980); In re Real Estate Title and Settlement Services Antitrust Litigation, MDL Docket No. 633, Slip Op. at 29 (E.D.Pa. June 10, 1986) (Van Artsdalen, J.). 654 F.Supp. at 1049. The controlling criterion is reasonableness and fairness; not what might have been agreed upon, nor what the district court believes might have been the optimal settlement. Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 515 (W.D. Mich. 1989).

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> [S]ettlement of any litigation . . . is basically a bargained exchange between the litigants. . . [T]he judiciary's role is properly limited to the minimum necessary to protect the interests of . . . the public. Judges should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel. [Bracketed material supplied.]

Armstrong, 616 F.2d at 315. See Randolph, 736 F.2d at 529 (district court should not condition approval of decree "on what it considered to be the public's best interest. Instead, the court should have deferred to the agency's decision that the decree is appropriate and simply ensured that the proposed judgment is reasonable" [emphasis in original]). Rather than determining whether "this is the best settlement that could have been obtained," it is "the Courts' duty to determine 'whether the settlement is within the reaches of the public interest.'" City of New York v. Exxon Corp., 697 F. Supp. 693 (D.C.N.Y. 1988) (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 [D. Mass. 1975]).

"CERCLA provides a district court reviewing a consent decree with the authority to (1) sign the consent decree or (2) refuse to sign the consent decree. If a district court refuses to sign a consent decree, it cannot then compel the parties to enter into a more acceptable agreement; it cannot compel the parties to take any action whatsoever . . . See United States v. Cannons Engineering Corp., 899 F.2d 79, 85-91 (1st Cir. 1990). The purpose of limiting the review of a district court is to compel

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the judiciary to defer to the governmental agency on highly technical issues within its expertise. Cannons, 899 F.2d at 87. "If a settlement were required to meet some judicially imposed platonic idea, then, of course, the settlement would constitute not a compromise by the parties but judicial fiat. Respect for the litigants, especially the United States, requires the court to play a much more constrained role." See April 5, 1991 Order of the Court, United States v. Amoco, et. al., Civil Action H-89-2734 (S.D.Tex.) (referring to United States v. Rohm & Haas Co., 721 F. Supp. 666, 685 [D.N.J. 1989])(copy attached).

Where a court is reviewing a consent decree to which the government is a party, the balancing of competing interests affected by a proposed consent decree "must be left, in the first instance, to the discretion of the Attorney General." United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981), cert. denied, 454 U.S. 1083 (1981); see also Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961) ("sound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . decree . . . in the absence of bad faith or malfeasance"); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied sub nom National Farmers' Organization, Inc. v. United States, et al., 429 U.S. 940 (1976) (Attorney General must retain discretion in "controlling government litigation and in determining what is in the public interest"). This principle

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is particularly important where the consent decree has been negotiated by the Justice Department on behalf of a federal administrative agency "specially equipped, trained and oriented in the field." United States v. National Broadcasting Co., 449 F. Supp. 1127, 1144 (C.D. Cal. 1978); accord, Thomas Solvent, 717 F. Supp. at 516; City of New York, 697 F. Supp. at 692. In other words,

> Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved . . . [T]he courts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment. [Bracketed material supplied.]

Randolph, 736 F.2d at 529. Such an agreement enjoys a presumption of validity. Rohm & Haas, 721 F.2d at 680. This is particularly true in a CERCLA case:

> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table.

Cannons, 899 F.2d at 84.

C. Factors to Consider in Reviewing a CERCLA Consent Decree

Congress and the courts have identified three factors for a court to consider in reviewing a proposed CERCLA settlement. The legislative history for the 1986 amendments to CERCLA establishes that a court's role in reviewing a Superfund settlement is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." H.R. Rep. No. 253, Part 3, 99th Cong., 1st Sess. 19 (1985).

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Cannons, 899 F.2d at 85 ("Reasonableness, fairness, and fidelity to the statute are, therefore, the horses which district judges must ride"). The three-part test of (1) fairness, (2) reasonableness, and (3) consistency with CERCLA's goals, is similar to the three-part test the courts have used in evaluating settlements under CERCLA, prior to the 1986 amendments. United States v. Conservation Chemical Co., 628 F. Supp. 400 (W.D. Mo. 1985) (reciting these same standards in pre-SARA CERCLA cases); United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982) (reciting same standards). This test is also consistent with the general standards applied by the Ninth Circuit when approving a settlement. Ficalora v. Lockheed California Co., 751 F.2d 995, 997 (9th Cir. 1985) (settlement should be "fair, reasonable and adequate..."); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977) (settlement must be "fair and adequate").

Consequently, in considering the de minimis partial consent decrees, this Court should evaluate their fairness, reasonableness, and consistency with Congress's goals in enacting CERCLA. The proposed settlements are fair to the settling defendants and the non-settlors. The decrees represent a good faith compromise of the claims of the United States, by balancing the risk involved in litigating such claims with the settling defendants, along with the rights of remaining defendants. In addition, the de minimis settlements are reasonable in that the

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settling defendants satisfy the criteria for de minimis status. Finally, the settlements further the legislative goals expressed in CERCLA as they will provide for prompt reimbursement of money to the Hazardous Substance Response Trust Fund (Superfund), and will serve the public interest.

1. The De Minimis Consent Decrees are Fair

The settlements are fair to both the de minimis parties and the non-settling defendants. The decrees represent a good faith compromise of the governments' cost recovery claims against the settlors, particularly in light of the significant litigation risks presented.[12] Pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), the non-settlors' liability is reduced by the settlement amount. Also, the non-settlors' ability to assert defenses is unaffected by the decrees. Further, the United States and any other party may seek additional relief against the settling parties if new information reveals that the settlors are no longer de minimis or if the remedy fails. Utility Decree ¶¶ 19 & 20; Landowner Decree ¶ 25.

In determining whether a settlement is fair, courts have examined whether the parties negotiated in good faith and whether the settlement reflects a compromise based upon litigation risks.

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[12] Based on the recent analysis by EPA which questions the culpability of the Utilities, it is plausible that the Utilities may not be found liable at the close of protracted and costly litigation. Resp. Sum at 5-6, 28-29, and 32-44. Similarly, the Landowners may be able to establish a defense to liability under 42 U.S.C. § 9607(b)(3). Id. at 59.

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United States v. Hooker Chemical and Plastics, Corp., 607 F. Supp. at 1057. See also Cannons, 899 F.2d at 87-9, 90 ("proposed settlement must take into account foreseeable risks of loss"). Here, there can be no question of the parties' good faith in negotiating the proposed decrees, a product of over two years of negotiations. The United States has interests clearly adverse to those of the de minimis settlors, thus assuring that the settlements resulted from arms-length negotiations conducted in good faith.

In addition, Courts have uniformly held that liability under CERCLA is joint and several where the harm is indivisible. See, e.g., United States and the South Carolina Department of Health and Environmental Control v. Monsanto Company, 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 726, 732 n.3 (8th Cir. 1986); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983); United States v. Chemdyne Corp., 572 F. Supp. 802, 805, 810 (S.D. Ohio 1983). Thus, each of the settling defendants might have been held individually responsible for all of the governments' response costs. On the other hand, the United States faced a significant burden of proving all necessary elements of liability against each de minimis settlor. The settlements are a compromise reflecting the balancing of these respective litigation risks.

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The de minimis consent decrees are also fair to the remaining defendants, including WNG and Simon. First, as noted above, the non-settlors' potential liability will be reduced by the $1,182,300 received from the de minimis parties. 42 U.S.C. § 9622(g)(5). Thus, the de minimis settlements will inure to the benefit of WNG and Simon as well as the United States and the public.

In addition, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), the extent of contribution protection is limited to the matters addressed in the settlements; the settlors are not protected from contribution for matters not covered under the consent decrees. In particular, the United States and the remaining defendants may all seek further relief if new information reveals that a settling defendant(s) is no longer eligible for de minimis status. Utility Decree at ¶¶ 17-20; Landowner Decree at ¶¶ 23-26. Thus, for example, if new information is discovered which shows that a settlor does not qualify for de minimis status, the United States or a non-settling party may seek additional relief from that particular settling defendant. Similarly, further relief may be sought if the remedy fails. Utility Decree at ¶¶ 19 & 20.

Finally, entry of the decrees will not deprive the remaining defendants of any defenses to liability or from asserting that they should not shoulder any or only a portion of the costs of cleaning up the Site. The non-settlors' ability to assert claims

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against any other PRP is similarly unaffected by the decrees. BN, WNG, and Simon have already filed claims for indemnity and contribution against non-settlors and parties not named by the United States.

In summary, the consent decrees were negotiated in good faith and are fair to settlors and non-settlors alike. Consequently, the decrees meet the "fairness" part of the test for approving consent decrees.

2. The De Minimis Consent Decrees are Reasonable

The decrees are reasonable because they further CERCLA's goals and clearly serve the public interest. In Conservation Chemical, the court set forth two factors relevant to whether a proposed settlement is "reasonable": (1) the extent to which the consent decree furthers the goals of the statute that forms the basis of the litigation;[13] and (2) the extent to which the court's approval of the consent decree is in the public interest. 628 F. Supp. at 402, relying on Seymour Recycling, 554 F. Supp. at 1339.[14] Consideration of these factors shows that the consent

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[13] This factor is discussed infra at page 23.

[14] The Conservation Chemical court discussed three additional factors: (1) the nature and extent of the hazards at the site; (2) the degree to which the remedy provided for in the decree will adequately address the hazards present at the site; and (3) the possible alternative approaches for remedying the hazards at the site. Because these factors -- in contrast to the proposed settlement -- all contemplate a consent decree requiring certain remedial relief (as opposed to payment of money), they are not germane to consideration of the proposed decrees.

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decrees are "reasonable".

The proposed settlements serve the public interest in several ways. First, entry of the decrees will result in the immediate payment of $1,182,300 to the government from ten parties without going through the expense of protracted litigation or a lengthy trial. The money will be used to replenish the Superfund, and thus to finance additional cleanup activities. The public will in turn benefit from the increased health and protection and improved environment provided for by cleaning up additional sites.

Second, the public interest is protected because there are viable parties who remain responsible for the unreimbursed costs.[15] Under principles of joint and several liability, each of the remaining defendants may be held individually responsible for all unreimbursed costs.

Third, the reopener provisions in the proposed settlements provide further financial protection to the government. If the remedy fails or if additional information reveals that any of the settlors should not be afforded de minimis treatment, the de minimis parties can be looked to for greater contribution. See Utility Decree ¶¶ 19 & 20; Landowner Decree ¶¶ 25 & 26.

Finally, entry of the consent decrees will significantly reduce the number of parties, simplify the litigation, and allow

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[15] WNG, Simon, UP and BN.

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the government to focus its resources on the major contributors to the problems at the Site. Rohm & Haas, 721 F. Supp. at 696. The public as well as the parties benefit from the "saving of time and money that results from the voluntary settlement of litigation." Gorsuch, 718 F.2d at 1126; accord, Seymour Recycling, 554 F. Supp. at 1339.

3. The Consent Decrees Further CERCLA's Goals

The third factor which Congress and case law indicate the Court should consider is whether the settlements further the goals of the statute which forms the basis of the litigation, namely CERCLA. As demonstrated below, the proposed settlements plainly further those goals.

a. The Settlements Promote CERCLA's Overriding Purpose

The overall goal of CERCLA is to protect the public health and the environment from the effects of the release or threatened release of hazardous substances into the environment. See, e.g., 42 U.S.C. § 9604; Lone Pine Steering Committee v. United States Environmental Protection Agency, 600 F. Supp. 1487, 1489 (D.N.J. 1985), aff'd, 777 F.2d 882 (3rd Cir. 1985) cert. denied, 476 U.S. 115 (1986). Although one source of funds used to help achieve this goal is the Superfund, it is a limited source and cannot finance cleanup of all of the many hazardous waste sites nationwide. See, e.g., Cong. Rec. H. 11,070 (Dec. 5, 1985) (Statement of Rep. Florio). Indeed, Congress was aware when it

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enacted CERCLA that the costs of response activities would greatly exceed the Superfund. See S. Rep. No. 848, 96th Cong. 2d Sess. at 17-18, reprinted in 2 CERCLA Legislative History at 47, 51. Thus, Congress established Section 107(a) of CERCLA, the provision allowing the United States to recover response costs from responsible parties and thereby replenish the Superfund for use at other facilities. 42 U.S.C. § 9607(a).

The settlements reached here serve the principal goal of CERCLA by ensuring over $1 million for immediate use by the Superfund to protect the public health and the environment.

b. The Settlements Implement the Goals of Section 122(g) of CERCLA

These settlements also further the statutory goals as expressed in Section 122(g) of CERCLA, 42 U.S.C. § 9622(g). Congress identified certain circumstances which are appropriate for a proposed de minimis settlement with the Utilities. Section 122(g)(1)(A) of CERCLA is very clear that, whenever practicable and in the public interest, as determined by EPA, EPA should enter into, as promptly as possible, a final settlement if it involves a minor portion of the response costs at the facility concerned and if, in EPA's judgment, the amount and the toxic or other hazardous effects of the hazardous substances contributed by the settling party are minimal in comparison to the other hazardous substances at the facility. 42 U.S.C. § 9622(g)(1)(A). Here, the statutory criteria are met by the Utilities. See

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sections IV and V, infra.

With respect to the Landowners, Congress identified certain circumstances which are deemed appropriate for a de minimis settlement. Section 122(g)(1)(B) of CERCLA is clear that, whenever practicable and in the public interest, as determined by EPA, EPA should enter into, as promptly as possible, a final settlement if it involves a minor portion of the response costs at the facility concerned, and if, in EPA's judgment, the PRP did not conduct or permit the generation, disposal or release, by act or omission, of any hazardous substance. 42 U.S.C. § 9622(g)(1)(B). Further, the PRP must not have bought the real property with actual or constructive knowledge that such property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance. Here, the statutory criteria are met by the Landowners. See sections IV and V, infra.

In determining whether this settlement should be approved, the Court need only satisfy itself that a good faith inquiry was made by EPA to consider the applicable above listed statutory criteria. See Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 786-788 (E.D.N.Y. 1978), aff'd 614 F.2d 1290 (2nd Cir. 1979). With a de minimis settlement, Congress intended that "EPA was to have substantial discretion" to interpret the statutory terms regarding eligibility for de minimis status "in light of both its expertise and its negotiating strategy in a given case."

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Cannons, 899 F.2d at 91. "The de minimis determination is in large respect a matter of litigation strategy within the prosecutorial discretion of EPA and the Department of Justice." Rohm & Haas, 721 F. Supp. at 684. Therefore, "in attempting to gauge a consent decree's consistency with the statute, courts must give wide berth to the agency's choise of eligibility criteria." Cannons, 899 F.2d at 91. In Sneaker Circus, the court noted that where the substance of the agency's action is committed to its discretion, as a matter of law, the court's inquiry is then limited to assuring itself that the relevant factors identified by Congress were considered. 457 F. Supp. at 786-788.

Accordingly, once EPA has demonstrated that it in good faith considered the statutory criteria, the Court's inquiry should be at an end. Rohm & Haas, 721 F. Supp. at 666; United States v. Acton Corp., 733 F. Supp. 869, 872 (D.N.J. 1990) ("A more intrusive role would prove unduly burdensome and contravene congressional intent by having this Court substitute it judgment for that of the statutorily appointed representative of the public interest, EPA and the Department of Justice"). The relevant documentation which EPA examined in determining whether to enter into these de minimis consent decrees amply demonstrates that EPA made a good faith evaluation of the applicable statutory criteria. By examining the Responsiveness Summary, this Court can assure itself that EPA followed the requisite procedures and

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made reasonable substantive determinations in reaching these settlements.

EPA has no reason for bias against WNG and Simon, or to favor the Utilities and Landowners. EPA has incurred a significant expenditure of resources in the process of considering the de minimis settlements. The reason for this effort is to accomplish the goals of Congress in simplifying litigation and securing prompt reimbursement of response costs from persons who qualify as de minimis parties. 42 U.S.C. § 9622(g).

Should this Court determine that substantive review is required, as a matter of law, such review should be on the basis of the Administrative Record, United States v. Town of Moreau, 751 F. Supp. 1044, 1050 (N.D.N.Y. 1990); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (197); Francis Dougherty, Sr. v. U.S. Navy Board for Correction of Naval Records, 784 F.2d 499, 501 (3rd Cir. 1986), and the applicable standard of review should be "the Administrative Procedure Act's 'arbitrary and capricious' standard." Town of Moreau, 751 F. Supp. at 1050. Based upon a review of the Administrative Record, the determinations of EPA cannot be deemed arbitrary or capricious. See sections IV and V, infra.

c. This Court Should Enter the Consent Decrees Without an Evidentiary Hearing

The case law specifically rejects the notion that de novo

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review is required of proposed settlements under CERCLA. Rohm & Haas, 721 F. Supp. at 666; In re Acushnet River and New Bedford Harbor, 712 F. Supp. 1019, 1031 n.21 (D. Mass. 1989); Thomas Solvent, 717 F. Supp. at 515 & 519 ("[A] court must avoid the detailed investigation required as if the parties were actually trying the case); United States v. Acton Corp., 749 F. Supp. 616, 620 (D.N.J. 1990). Where the record supports a proposed de minimis settlement, there is no need for testimonial or evidentiary hearing:

> It is inconceivable that Congress, wishing to provide EPA with statutory tools to make the most efficient use of its enforcement resources, would urge EPA to reach speedy settlements with de minimis parties but then require such settlements to be subject to de maximis judicial review.

Rohm & Haas, 721 F. Supp. at 686. The First Circuit recently held that a party who opposes the entry of a proposed consent decree has no right to an evidentiary hearing on the suitability of the consent decree prior to entry:

> We believe that evidentiary hearings are not required under CERCLA when a court is merely deciding whether monetary settlements comprise fair and reasonable vehicles for disposition of Superfund claims.

Cannons, 899 F.2d at 93-94; accord, City of New York, 697 F. Supp. at 691-692. Similarly, in United States v. Bliss, 133 F.R.D. 559, 568 (E.D. Mo. 1990), the Court found no need for an evidentiary hearing.

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The intent of Congress to defer to EPA in making de minimis determinations is clear under CERCLA:

> (g) DE MINIMIS SETTLEMENTS.-
>
> (1) **EXPEDITED** FINAL SETTLEMENT.-
>
> Whenever practicable and in the public interest, **as determined by the President**, the President shall, **as promptly as possible**, reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 if such settlement involves only a minor portion of the response costs at the facility concerned and, **in the judgment of the President**, the conditions in either of the following subparagraphs (A) or (B) are met...

42 U.S.C. § 9622(g) (emphasis added). Congress was careful to specify that it is the **judgment** of the President, and matters **determined** by the President, which form the basis for a de minimis settlement. By examining relevant information, and utilizing its expertise, EPA, acting for the President,[16] has made the **judgment** that the settlements comply with the statutory criteria, and has **determined** that it is in the interests of the public to enter into these settlements.

EPA has considered over 5,000 pages of documentation relative to the proposed de minimis settlements. This includes business records, affidavits, legal memoranda, data, technical calculations, and scientific information provided by WNG, Simon, the Utilities, and the Landowners. EPA has also reviewed

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[16] The authority of the President under CERCLA is delegated to the Administrator of EPA by Executive Order.

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relevant deposition testimony provided from the related contribution action (C89-155TB). In light of the relevant statutory criteria, EPA has tasked its experts and personnel with the special training and orientation in these matters to assess all of this information. In short, EPA has devoted several years and hundreds of hours evaluating the settlement issues, and has made reasonable, not arbitrary or capricious, determinations.

An evidentiary hearing would entail having thirteen parties involved in producing and examining dozens of witnesses. It would also involve thousands of pages of records being introduced into evidence and explained to the Court. In short, it would be a time consuming burden on the Court, the government, and the de minimis parties. EPA has already evaluated all of this information, and has made decisions which are supported by the Administrative Record before the Court.[17]

After such an in-depth and comprehensive effort, this Court should defer to the reasonable judgments of EPA, the federal agency authorized by Congress to make such judgments. 42 U.S.C. § 9622(g)(1). In approving a de minimis settlement, the court in Rohm & Haas noted "CERCLA's preference" for settlements and stated it "could not substitute its judgment for that of EPA and the Department of Justice." 721 F. Supp. at 680-681, 686. The First Circuit allowed for similar deference to EPA:

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[17] Ad. Rec. at 1.1.4-0001 to -0005.

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> [I]t is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.

Cannons, 899 F.2d at 84.

An evidentiary hearing would also negate the statutory goal of "minimizing litigation." Rohm & Haas, 721 F. Supp. at 686; Thomas Solvent, 717 F. Supp. at 518. EPA has made reasonable determinations based upon careful consideration of all information, and as stated by the First Circuit:

> Having selected a reasonable method of weighing comparative fault, the agency need not show that it is the best, or even the fairest, of all conceivable methods. The choice of the yardstick to be used for allocating liability must be left primarily to the expert discretion of the EPA, particularly when the PRPs involved are numerous and the situation is complex.

Cannons, 899 F.2d at 88.

To require an evidentiary hearing would frustrate the Congressional goals of achieving "expedited" settlement "as promptly as possible." The statutory de minimis settlement provisions were designed to ensure that neither the public agencies, nor private parties, nor the courts, waste precious time and resources on litigating liability instead of cleaning up the environment. Thomas Solvent, 717 F. Supp. at 518. If EPA is now required to expend additional resources on an evidentiary hearing, it would negate the extensive resources already devoted toward bringing this matter to resolution. In light of the

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particular policy of CERCLA to "expedite remedial action and minimize litigation," 42 U.S.C. § 9622(a), judicial resources and public monies would be better focused on the primary issue of obtaining cleanup of the Site.

Despite considerable effort by EPA, the parties primarily responsible for the pollution, WNG and Simon, have yet to even begin cleanup of the Site. EPA has sued these parties in the instant action to obtain the needed assistance of the Court in affecting such cleanup. WNG and Simon have made a concerted effort to focus the attention of this Court and EPA away from the primary issue of cleanup, and onto the secondary issue of the de minimis settlements. If the Court requires an evidentiary hearing, WNG and Simon will continue to succeed in draining public resources at the expense of protecting public health and the environment. Therefore, this Court can facilitate cleanup of the Site by entering the settlements based upon a review of the Administrative Record.

The fact that WNG and Simon may eventually be required to shoulder the heaviest load in terms of cleanup costs "is and integral part of the statutory plan." Cannons, 899 F.2d at 92. CERCLA "is not a legislative scheme which places a high priority on fairness" to non-settlors, and "any unfairness to a non-settlor is a by product of the congressional scheme, about which a court may do nothing in the absence of harm rising to a constitutional level." Rohm & Haas, 721 F. Supp. at 686-687;

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accord, Acton, 749 F. Supp. at 619 ("The Court need not consider the fairness of the decree to non-settling parties"); see also Cannons, 899 F.2d at 94 ("Although appellants may suffer adverse effects from the consummation of the settlements embodied in the decrees, those effects stem not from any systematic unfairness but from the combination of Congress' plan and appellants' own conduct...). If WNG and Simon object to that policy, their argument is with Congress, not with the Court. Cannons, 899 F.2d at 92; City of New York, 697 F. Supp. at 694. This Court can end the delays, and begin the cleanup process, by entering the settlements, based upon the reasonable determinations of EPA set forth in the Administrative Record.[18]

IV. THE CONSENT DECREES

A. The Utility Decree

The Utility Decree requires the Utilities to pay $963,600.00, which represents 5% of the currently estimated response costs at the Site, plus a premium of $166,900.00 for potential cost overruns. Utility Decree at ¶ 13. The 5% figure represents the approximate proportionate share of hazardous substances (PCBs) which EPA determined the Utilities may have contributed to the Site. Resp. Sum. at 13-14.

In consideration of their payment of response costs, the Utilities are granted a covenant not to sue for claims under

[18] Ad. Rec. at 1.1.4-0001 to -0005.

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CERCLA Sections 106 and 107 for response costs and injunctive relief. The covenant is subject to several "reopener" provisions that allow the United States to institute a new action against the Utilities if certain conditions occur. Utility Decree at ¶ 17. Pursuant to these reopener provisions, if new information indicates either that the Utilities no longer qualify for a de minimis settlement, or that the remedy for the Site is no longer protective of public health or the environment due to the presence of PCBs, then, the covenant not to sue notwithstanding, the United States may institute a new action against the Utilities and seek further relief. Id. at ¶ 20. In addition, further action against the Utilities is not precluded if the pilot study to be conducted at the Site indicates that the remedy set forth in the ROD is not feasible. Id. In that event, the Utilities may be liable to pay any additional costs (or some portion thereof) associated with implementing an alternative remedy.

B. The Landowner Decree

The Landowner Decree was negotiated with four parties who are owners of contaminated property contained within the boundaries of the Site. The Decree requires the Landowners to pay $218,700.00 of the total response costs at the Site. Landowner Decree at ¶ 14. In addition, the Decree requires the Landowners to provide EPA with access to their property for the purpose of performing remedial action and to implement extensive

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institutional controls restricting future uses of their property. Id. at ¶¶ 12 & 18-22.

The Landowners will receive a covenant not to sue from the United States for claims for response costs and injunctive relief, subject to several "reopeners." Id. at ¶¶ 23-24. If new information indicates that the Landowners no longer qualify for a de minimis settlement, or if they are not exercising due care with respect to hazardous substances at the Site, then the United States may institute further proceedings against the Landowners to seek relief. Id. at ¶¶ 25-26.

V. RESPONSE TO PUBLIC COMMENTS

The public comments on the partial de minimis consent decrees are included as part of Exhibit 1.[19] The United States received comments only from WNG and Simon, two of the non-settling defendants. A summary of these comments and EPA's detailed response is provided as Exhibit 2.[20] The following summary focuses on the comments and responses pertaining to the essential statutory criteria for de minimis settlements.

A. Comments by WNG and Simon on the Utility Decree

The comments of WNG and Simon question whether the settlement with the Utilities satisfies the statutory requirements for a de minimis settlement under Section

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[19] Ad. Rec. at 1.6-0001 to -0003.

[20] EPA has analyzed and responded to nearly 2,000 pages of comments and attachments from WNG and Simon.

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122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A). This provision authorizes de minimis settlements if:

1. the settlement involves only a minor portion of the response costs at the Site;

2. the settlement is practicable and in the public interest;

3. the amount of hazardous substances contributed by each of the Utilities is minimal in comparison to the amount of other hazardous substances at the Site; and

4. the toxic or other hazardous effects of the substances contributed by each of the Utilities is minimal in comparison to the toxic or other hazardous effects of the other hazardous substances at the Site.

The first requirement is that the proposed settlement must involve only a "minor" portion of the response costs at the Site. 42 U.S.C. § 9622(g)(1). EPA estimates that the amount of hazardous substances attributable to the Utilities is only 5% of the total volume of hazardous substances at the Site. Id. at 11-14.[21] The cost of remediating this contamination is commensurately small. Therefore the Utilities are responsible for only a minor portion of the response costs at the Site.

[21] The settlement amount need not be exactly proportionate to the Utilities' volumetric contribution to the Site, "[b]ut where a money settlement is shown to bear a reasonable relation to some plausible estimate, or range of estimates, of the settling parties' volumetric contribution, CERCLA requires that such a settlement be accepted and entered as a consent decree." Rohm & Haas, 721 F. Supp. at 687.

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The second requirement is that the settlement must be "practicable and in the public interest." The de minimis settlement with the Utilities will simplify the instant litigation and reduce the resources to be expended by the United States. The government will then be able to focus its resources on seeking to require cleanup by WNG and Simon, the two parties primarily responsible for contamination at the Sit, and other non-settling defendants. Together, these parties can fund the cleanup of the Site, thereby assuring that the public is not subject to this burden. The United States will also be able to immediately reimburse almost one million dollars to the Superfund. This money can then accrue interest, and the principal plus interest can be utilized for cleanup at other hazardous facilities.

The third requirement is that the amount of hazardous substances contributed to the Site by the Utilities must be "minimal" in comparison to other hazardous substances at the Site. 42 U.S.C. § 9622(g)(1)(A)(i). The documentation available to EPA in 1988, indicated that the Utilities had sold transformers to Simon. Resp. Sum. at 11. In evaluating a de minimis settlement with the Utilities, EPA made several conservative assumptions which inured to the non-settling defendants' benefit. First, since transformers sometimes contain oil contaminated with PCBs, it was assumed that the transformers sold by the Utilities were completely filled with PCB-

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contaminated oil. Id. EPA also assumed that all of this oil was disposed of on-Site by Simon. Id.

These assumptions significantly favor WNG and Simon because there is documentation indicating that numerous transformers sold by the Utilities were drained of oil prior to shipment to Simon. Id. at 12. In addition, there is information indicating that Simon either resold many of the transformers without bringing them on-Site, or drained the oil from the transformers and did not dispose of it on-Site. Id. Also, often transformers do not contain PCB-contaminated oil. Id. at 7 & 33-37. All of this suggests that the assumptions made by EPA overestimate the amount of hazardous substances (PCBs) which the Utilities may have contributed to the Site.

For purposes of comparison, EPA considered the amount of PCBs possibly contributed by the Utilities relative to the amount of PAHs at the Site. It is not possible to determine the exact amounts of these hazardous substances. Nevertheless, it is possible to accurately estimate the amount of transformer oil, a potential carrier of PCBs, contributed by the Utilities, and the amount of coal tar, a carrier of PAHs, disposed of by WNG at the Site.

By utilizing information regarding the number of transformers sold by the Utilities to Simon EPA was able to calculate the maximum amount of PCB-laden oil possibly contributed by the Utilities. Resp. Sum. at 13. The amount of

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PAH-contaminated coal tar at the Site was estimated by WNG and Simon in the RI/FS. Id. By comparing these amounts, EPA determined that the PCB-contaminated oil attributable to the Utilities was only 6.2% of the total volume of hazardous substances, assuming only such oil and PAH-contaminated coal tar to be present at the Site. Id. Since there are other hazardous substances at the Site, including lead, other metals, benzene, and PCBs from sources other than the Utilities, the amount of PCBs contributed by the Utilities would be an even smaller percentage of the actual total volume of hazardous substances. Therefore, for purposes of settlement, EPA determined it was fair to hold the Utilities responsible for 5% of the contamination at the Site. Id. at 14.[22]

Further support for the conclusion that the Utilities contributed a "minimal" amount of hazardous substances to the Site is provided by considering studies of metal recycling facilities. According to these studies, virtually all of the PCB contamination at the Site could be attributed to the "shredder fluff" generated by Simon. Id. at 5-6, 28-29, & 32-44. Since "shredder fluff" does not contain material from transformers, the

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[22] On six occasions, EPA received information from WNG and Simon which these parties claimed demonstrated that the Utilities were responsible for a larger share of the contamination at the Site. Resp. Sum. at 14-18. Each time, EPA carefully analyzed the additional information and the claims of WNG and Simon. In light of all available information, this additional information did not alter the percentage share of contamination attributable to the Utilities. Id.

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Utilities are not responsible for the contamination from such fluff. Id. These studies strongly suggest that the Utilities may be responsible for less than 5% of the hazardous substances at the Site. Id.[23]

The final requirement is that the toxic or other hazardous effects of hazardous substances (PCBs) contributed by the Utilities must be "minimal" in comparison to other hazardous substances at the Site. 42 U.S.C. § 9622(g)(1)(A)(ii). EPA toxicologists have carefully considered this factor in evaluating the proposed settlement. EPA has determined that the health and environmental effects of the PCBs possibly contributed by the Utilities is minimal when compared to the toxicities, concentrations, distributions, and adverse consequences of PAHs, lead, and benzene at the Site. Resp. Sum. at 18-28 & 31-32.

B. Comments by WNG and Simon on the Landowner Decree

WNG and Simon raised comments suggesting that various actions of the Landowners disqualify them from consideration for de minimis property-owner settlements. Section 122(g)(1)(B) of CERCLA, 42 U.S.C. § 9622(g)(1)(B), requires that the Landowners

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[23] In addition, there is recent information from the "Extent of Contamination" study which indicates that the amount of coal tar at the Site is almost twice the previous estimate set forth in the RI/FS. Resp. Sum. at 17-18. By again comparing the amount of coal tar (carrier of PAHs) contributed by WNG to the amount of transformer oil (carrier of PCBs) contributed by the Utilities, this recent information suggests that the portion of hazardous substances at the Site attributable to the Utilities may be significantly less than 5%. Id.

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must not have:

1. conducted or permitted the generation, transportation, storage, treatment, or disposal of any hazardous substance at the Site;

2. contributed to the release of a hazardous substance at the Site through any act or omission; or

3. purchased property with the actual or constructive knowledge that such property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

The Landowners have submitted affidavits, records, and other information which indicate that they did not know of or participate in activities which caused contamination at the Site. The same hazardous substances introduced by WNG (PAHs, lead, benzene, phenols, and metals) and Simon (PCBs and metals) have been found on areas of property owned by the Landowners. The RI/FS produced by WNG and Simon suggests that such contamination probably resulted from spillage, run-off, and drainage from the WNG and Simon operations. Resp. Sum. at 61. Specific facts regarding each of the Landowners are summarized below.

1. Hygrade Food Products Corporation

Hygrade Food Products Corporation (Hygrade) has operated a meat packing plant on the Site since 1954. Hygrade leased property within the Site from 1954 to 1979, and purchased this property in 1979 at a price that reflected uncontaminated value. Id. at 61. At the time of purchase, Hygrade performed a visual

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inspection and inquired into prior uses of the property. Id. Hygrade points out that it was unaware of any hazardous substance on the property until notified of such by EPA in 1982. Id. Hygrade then requested that Simon remediate the contamination. Id. Further, Hygrade points out, while operating the meat packing plant, it is obligated to follow stringent federal and state regulations which preclude the use of toxic chemicals. Id.

Simon contends that Hygrade will sustain an economic benefit by having its property remediated at the expense of Simon. This contention fails to recognize that Hygrade has had its property diminished in value due to the activities of Simon, and that the remediation will simply restore the value which Hygrade lost due to these activities. In addition, Hygrade participated in the funding of the RI/FS, and will contribute $190,800 toward reimbursement of government response costs pursuant to the de minimis settlement.

2. City of Tacoma

The City of Tacoma (Tacoma) owns a right-of-way and a strip of land which serves as an easement for a sewer line within the Site. Resp. Sum. at 62. With one exception, neither WNG or Simon contest the eligibility of Tacoma to qualify for a de minimis property-owner settlement. WNG contends that Tacoma cannot obtain such a settlement, if the Department of Public Utilities (one of the de minimis Utilities) contributed some contamination to the Site. However, under the City Charter,

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Tacoma and the Department of Public Utilities are considered separate entities which serve distinct functions. Id. at 64. Therefore, these parties can each qualify separately for de minimis settlements.

3. John D. Simchuck and Larry J. Hansen

John Simchuck and Larry Hansen have owned property within the Site since 1981. A property inspection prior to purchase revealed no evidence of contamination. Id. at 62. Except to clear and regrade the land, Mr. Simchuck and Mr. Hansen represent that neither has ever made use of or conducted activity on the property. Id. WNG and Simon suggest that Messrs. Simchuck and Hansen introduced contamination to the Site. There is no support in the record for this suggestion. Rather, Messrs. Simchuck and Hansen point out that they placed clean soil on their property. Indeed, as acknowledged by WNG and Simon in the RI/FS, the contamination on the property of Messrs. Simchuck and Hansen is most likely the result of run-off of hazardous substances from the adjacent properties and operations of WNG and Simon. Id. at 38-44, 62 & 65-67.

VI. CONCLUSION

The settlements embodied in the de minimis partial consent decrees comply with the relevant statutory standards. The Responsiveness Summary of EPA demonstrates that the concerns expressed in the public comments have been appropriately addressed in the settlements. The proposed consent decrees are

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consistent with the requirements and purposes of CERCLA, and are therefore reasonable settlements of claims in this matter. For all of the reasons stated above, this Court should enter the de minimis consent decrees.

Respectfully submitted,

RICHARD B. STEWART
Assistant Attorney General

KALYN CHERIE FREE
Environmental Enforcement
Environment and Natural Resources
Division
United States Department of Justice
Washington, D.C. 20530
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Agency
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Washington, D.C. 20460
(202) 475-7735

Simon & Sons ?

Landsburg Mine

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BURLINGTON NORTHERN RAILROAD, CO., a foreign corporation, Plaintiff, v. WASHINGTON NATURAL GAS COMPANY, a Washington corporation; and JOSEPH SIMON & SONS, Defendants.	NO. C89-155TB (Consolidated with No. C89-487TB and No. C90-5373B) PARTIAL CONSENT DECREE FOR DE MINIMIS SETTLEMENT BETWEEN THE UNITED STATES OF AMERICA AND PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY; PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY; PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY; PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY; PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY; CITY OF CENTRALIA; AND PORT OF TACOMA
UNITED STATES OF AMERICA, Plaintiff, v. JOSEPH SIMON & SONS, et al., Defendants.	

WHEREAS, the United States of America, on behalf of the Administrator of the United States Environmental Protection

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Agency (EPA), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (CERCLA) 42, U.S.C. §§ 9606 and 9607, seeking injunctive relief, penalties, and damages regarding the cleanup of the Tacoma Tar Pits Site, as defined herein (Site), and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, the United States has incurred and continues to incur response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, Public Utility District No. 1 of Clark County, Public Utility District No. 2 of Grant County, Public Utility District No. 1 of Snohomish County, Public Utility No. 3 of Mason County, Public Utility District No. 1 of Cowlitz County, City of Centralia, and Port of Tacoma (De Minimis Settlors) have been named as third-party defendants in this matter;

WHEREAS, this settlement resolves the claims which the United States could assert against the De Minimis Settlors pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief or response costs regarding the Site;

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WHEREAS, EPA has determined that settlement with the De Minimis Settlors is practicable and in the public interest;

WHEREAS, this settlement involves only a minor portion of the response costs for the Site;

WHEREAS, in the judgment of EPA, based on currently available information, including letters and supporting documentation submitted to EPA by the De Minimis Settlors and Washington Natural Gas Company, and the Administrative Record in United States of America v. Joseph Simon & Sons, et al., No. C90-5373B, consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas et al., C89-155TB under cause number C89-155TB, pertaining to the Partial Consent Decrees for De Minimis Settlements entered on May 10, 1991, the amount of hazardous substances contributed to the Site by the De Minimis Settlors does not exceed .85% of the hazardous substances at the Site;

WHEREAS, in the further judgment of EPA, the amount of hazardous substances contributed to the Site by each De Minimis Settlor and the toxic or other hazardous effects of such substances are minimal in comparison to other hazardous substances at the Site; and

WHEREAS, the United States and the De Minimis Settlors agree that settlement without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action between these parties;

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NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED as follows:

JURISDICTION

1. This Court has jurisdiction over the subject matter of this action, and over the parties to this Partial Consent Decree, pursuant to 28 U.S.C. §§ 1331 and 1335 and 42 U.S.C. §§ 9607 and 9613. The parties agree to be bound by the terms of this Partial Consent Decree, and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

PARTIES BOUND

2. This Partial Consent Decree shall apply to and be binding upon the United States and shall apply to and be binding upon the De Minimis Settlors, their directors, officers, employees, agents, successors and assigns. Each signatory to this Partial Consent Decree represents that he or she is fully authorized to enter into the terms and conditions of this Decree and to bind legally the party on whose behalf he or she is signing.

DEFINITIONS

3. "De Minimis Settlors" means the named defendants who are signatories to this decree.

4. "Hazardous substance" shall have the meaning provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

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5. "Partial Consent Decree" means this Decree and all attachments hereto.

6. "Parties" means the United States and the De Minimis Settlors.

7. "Pollutant" and "contaminant" shall have the meaning provided in Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).

8. "Record of Decision" means the administrative Record of Decision issued by EPA setting forth the remedial action requirements for the Site.

9. "Site" shall mean the approximately thirty acres of property located in the Commencement Bay tideflats area of Tacoma, Washington, that is bordered by Portland Avenue and St. Paul Avenue on the northeast and the sanitary sewer trunk line in the southeast, Union Pacific Railroad tracks in the south and East J Street on the west. Attachment 1 to this Partial Consent Decree, incorporated by reference herein, presents legal descriptions of several parcels of which constitute portions of the site. Generally, at its northernmost point, the boundary begins near the pair of wells nearest St. Paul Avenue and extends southeast in a straight line until it intercepts Portland Avenue and the sewer trunk line. The boundary continues to the southwest paralleling the sanitary sewer lines, follows the turn of the sewer pipe, and then turns northwest and extends parallel to and halfway between the Burlington Northern and Union Pacific

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ATTACHMENT 3

PARTIAL CONSENT DECREE FOR DE MINIMIS SETTLEMENT

SETTLING DEFENDANT	SETTLING DEFENDANT
Public Utility District No. 1 of Clark County Amount to be paid: $78,252.00	Public Utility District No. 1 of Cowlitz County Amount to be paid: $8,508.00
Public Utility District No. 2 of Grant County, Washington Amount to be paid: $28,852.00	City of Centralia Amount to be paid: $6,238.00
Public Utility District No. 1 of Snohomish County Amount to be paid: $31,744.00	Port of Tacoma Amount to be paid: $151.00
Public Utility District No. 3 of Mason County Amount to be paid: $14,393.00	

ORIGINAL FILE COPY

SIGNATURE PAGE

CITY OF CENTRALIA

City of Centralis consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas Co., et al. under Cause No. No. C89-155TB, including all Attachments on June 10, 1991.

By THOMAS M. JONES, ESQ.

Title ATTORNEY FOR CENTRALIA

Signature T. M. J.

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CERTIFICATION OF DE MINIMIS SETTLORS

16. Each De Minimis Settlor certifies that, to the best of its knowledge and belief, it has provided to the United States all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents which relates in any way to the ownership, operation, generation, treatment, transportation or disposal of hazardous substances at or in connection with the Site.

COVENANT NOT TO SUE

17. Subject to the reservation of rights set forth below, upon payment of the amounts specified in Attachment 3 to this Partial Consent Decree, the United States covenants not to sue or to take any other civil or administrative action against any of the De Minimis Settlors for matters addressed in this settlement (Covered Matters). Covered Matters shall include any and all civil liability for reimbursement of response costs (including, but not limited to, RI/FS costs expended by other defendants, RI/FS and oversight costs expended or to be expended by the United States and/or the State of Washington, and costs incurred by other defendants or potentially responsible parties and/or the United States and/or the State of Washington to complete the remedial action) or for injunctive relief pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), with regard to the Site.

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18. In consideration of the United States' covenant not to sue, the De Minimis Settlors agree not to assert any claims or causes of action against the United States or the Hazardous Substance Superfund arising out of Covered Matters or to seek any other costs, damages, or attorney's fees from the United States arising out of response activities at the Site.

RESERVATION OF RIGHTS

19. Nothing in this Partial Consent Decree is intended to be nor shall it be construed as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any of the De Minimis Settlors for:

a. Any liability as a result of failure to make the payments required by this Partial Consent Decree; or

b. Any matters not expressly included in Covered Matters, including, without limitation, any criminal liability or liability for damages to natural resources.

20. Nothing in this Partial Consent Decree will constitute a covenant not to sue or to take action or otherwise will limit the ability of the United States to seek or obtain further relief from the De Minimis Settlors, and the covenant not to sue set forth above will become null and void:

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a. as to any individual De Minimis Settlor, if information not currently known to the United States is discovered which indicates that such De Minimis Settlor contributed any hazardous substances to the Site in such greater amounts or of such greater toxic or other hazardous effects that such De Minimis Settlor no longer qualifies as a De Minimis party with respect to the Site;

b. if the United States determines, based upon conditions at the Site, previously unknown to the United States, or information received, in whole or in part, after entry of this Partial Consent Decree, that the remedial action, consistent with EPA's Record of Decision, is not protective of public health or the environment because of the presence of polychlorinated biphenyls; or

c. if the Record of Decision is modified by EPA as a result of the pilot-scale test to be conducted at the Site.

21. If any of the events specified in paragraphs 20.a., b., or c. occurs, the amount of the payment made by the De Minimis Settlor pursuant to paragraph 13 to this Partial Consent Decree shall be credited against any liability for Covered Matters established by the United States against the De Minimis Settlors.

22. Nothing in this Partial Consent Decree is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in

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law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Decree.

CONTRIBUTION PROTECTION

23. Subject to the reservations of rights set forth above, the United States agrees that by entering into and carrying out the terms of this Partial Consent Decree, each De Minimis Settlor will have resolved its liability to the United States for Covered Matters pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters.

CLAIMS AGAINST THE FUND

24. Nothing in this Partial Consent Decree shall be deemed to constitute preauthorization of a CERCLA claim within the meaning of Section 112 of CERCLA, 42 U.S.C. § 9612.

PUBLIC COMMENT

25. This Partial Consent Decree shall be subject to a thirty (30) day public comment period pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). The United States may withdraw its consent to this Partial Consent Decree if comments received disclose facts or considerations which indicate that this Decree is inappropriate, improper or inadequate.

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EFFECTIVE DATE

26. The effective date of this Partial Consent Decree shall be the date of entry by this Court, following public comment.

UNITED STATES OF AMERICA

By_____
RICHARD B. STEWART
Assistant Attorney General
Land & Natural Resources
Division
U. S. Department of Justice
Washington D.C.

By_____
KALYN CHERIE FREE
Attorney
Environmental Enforcement
Section
U. S. Department of Justice
Washington, D.C.

By_____
RICHARD DAVID MEDNICK
WSBA No. 17697
Assistant Regional Counsel
EPA, Region 10
Seattle, Washington

SO ORDERED AND ENTERED this _____day of_____, 1991.

_____
United States District Judge

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SIGNATURE PAGE

PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY

Public Utility District No. 1 of Clark County consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas Co., et al. under Cause No. C89-155TB, including all Attachments on _____, 1991.

By _____

Title_____

Signature_____

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SIGNATURE PAGE

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY

Public Utility District No. 2 of Grant County consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas Co., et al. under Cause No. C89-155TB, including all Attachments on _____, 1991.

By_____

Title_____

Signature_____

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SIGNATURE PAGE

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY

Public Utility District No. 1 of Snohomish County consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co v. Washington Natural Gas Co., et al. under Cause No. C89-155TB, including all Attachments on _____, 1991.

By_____

Title_____

Signature_____

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SIGNATURE PAGE

PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY

Public Utility District No. 1 of Mason County consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas Co., et. al. under Cause No. C89-155TB, including all Attachments on _____, 1991.

By_____

Title_____

Signature_____

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SIGNATURE PAGE

PUBLIC UTILITY DISTRICT NO. 1 OF COWLITZ COUNTY

Public Utility District No. 1 of Cowlitz County consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas Co., et al. under Cause No. C89-155TB, including all Attachments on _____, 1991

By_____

Title_____

Signature_____

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PORT OF TACOMA

Port of Tacoma consents to this Partial Consent Decree for De Minimis Settlement in United States of America v. Joseph Simon & Sons et al., consolidated with Burlington Northern Railroad Co. v. Washington Natural Gas Co., et al. under Cause No. C89-155TB, including all Attachments on _____, 1991.

By _____

Title _____

Signature _____

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ATTACHMENT 3

PARTIAL CONSENT DECREE FOR DE MINIMIS SETTLEMENT

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CITY OF CENTRALIA

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By THOMAS M. JONES, ESQ.

Title ATTORNEY FOR CENTRALIA

Signature Tom. Jones

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