



1 INTRODUCTION

2 A. In entering into this De Minimis Consent Decree  
3 (Decree), the mutual objective of the Washington State  
4 Department of Ecology (Ecology), CMX, Inc. (CMX) and its agents,  
5 employees, officers, and directors acting on behalf of CMX, and  
6 Flat Top 8 Associates (Flat Top 8) is to resolve the liability  
7 of CMX and Flat Top 8 relating to the release of a hazardous  
8 substance, known as Perchloroethylene (PCE), from property owned  
9 by Flat Top 8 and operated by CMX, which is located within the  
10 Yakima Railroad area in Yakima, Washington. The legal  
11 description of the Yakima Railroad area is attached hereto as  
12 Exhibit A and incorporated herein (the Site). The legal  
13 description of the property owned by Flat Top 8 and operated by  
14 CMX is attached hereto as Exhibit B and incorporated herein (the  
15 CMX Property). To accomplish these objectives and to resolve  
16 the matter constructively and without litigation, CMX, Flat  
17 Top 8 (hereinafter CMX and Flat Top 8 will be referred to  
18 collectively as "CMX") and Ecology consent to the actions  
19 required by this Decree.

20 B. A Complaint and Answer in this action have been filed.  
21 There has not been a trial on any issue of fact or law in this  
22 case. However, the parties wish to resolve the issues raised by  
23 the Complaint. In addition, the parties agree that settlement  
24 of these matters without litigation is reasonable and in the  
25 public interest and that entry of this Decree is the most  
26 appropriate means of resolving these matters.

1 C. In signing this Decree, CMX and Ecology agree to its  
2 entry and agree to be bound by its terms.

3 D. By entering into this Decree, the parties do not  
4 intend to discharge nonsettling parties from any liability they  
5 may have with respect to investigation and remedial activities  
6 at the Site. Except as set forth herein, CMX and Ecology retain  
7 the right to seek reimbursement in whole or in part from any  
8 responsible entities for sums expended on investigation and  
9 remedial activities at the Site, and to seek any other costs  
10 that are legally recoverable.

11 E. By entering into this Decree, CMX is not admitting any  
12 liability or facts alleged herein.

13 I. JURISDICTION AND VENUE

14 A. This Court has jurisdiction over the subject matter  
15 and over the parties pursuant to the Model Toxics Control Act  
16 (MTCA), which was passed by initiative (Initiative 97) and which  
17 took effect on March 1, 1989. The MTCA has been codified as  
18 ch. 70.105D RCW. Venue is properly laid in Yakima County  
19 pursuant to RCW 70.105D.050(5)(b).

20 B. Authority is conferred upon the Washington State  
21 Attorney General by RCW 70.105D.040(4)(a) to agree to a  
22 settlement with any potentially liable person if, after public  
23 notice and hearing, Ecology finds the proposed settlement would  
24 lead to a more expeditious cleanup of hazardous substances in  
25 compliance with cleanup standards under RCW 70.105D.030(2)(d).

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1 RCW 70.105D.040(4)(b) requires that such a settlement be entered  
2 as a consent decree issued by a court of competent jurisdiction.

3 C. Ecology has given notice to CMX as provided in RCW  
4 70.105D.020(8), of Ecology's determination that CMX is a  
5 potentially liable person for the Site and that there has been a  
6 release of hazardous substances at the Site.

7 D. Ecology has determined that past activities at the CMX  
8 Property may have given rise to a release of hazardous  
9 substances. CMX maintains that no such release has occurred at  
10 the CMX Property.

11 E. By entering into this Decree, CMX agrees not to  
12 challenge the jurisdiction of Ecology in any proceeding to  
13 enforce this Decree. CMX has agreed to undertake the actions  
14 specified in this Decree and consents to the issuance of this  
15 Decree, pursuant to ch. 70.105D RCW.

16 **II. PARTIES BOUND**

17 This Decree shall apply to and be binding upon the  
18 signatories to this Decree (parties), their successors and  
19 assigns. The undersigned representative of each party hereby  
20 certifies that he or she is fully authorized to enter into this  
21 Decree and to execute and legally bind such party to comply with  
22 the Decree. No change in the ownership or corporate status of  
23 CMX shall alter the responsibility of CMX under this Decree.

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1 **III. DEFINITIONS**

2 Unless otherwise specified, the definitions set forth in  
3 the Model Toxics Control Act, ch. 70.105D RCW, and ch. 173-303  
4 WAC shall control the meaning of the terms used in this Consent  
5 Decree.

6 **IV. STATEMENT OF FACTS**

7 The CMX Property--Synopsis of PCE Contamination, attached  
8 to this Consent Decree as Exhibit C and incorporated herein  
9 (Synopsis), contains a statement of facts describing CMX, the  
10 CMX Property, and the results of testing for PCE contamination  
11 at the CMX Property. Based on the facts outlined in the  
12 Synopsis, Ecology has determined that the release or potential  
13 release of hazardous substances at the CMX Property has been  
14 resolved, and that a settlement with Plaintiff is appropriate.  
15 CMX has undertaken measures necessary to insure the protection  
16 of public health, welfare and the environment, by participating  
17 in a bottled water program pursuant to Department of Ecology  
18 Enforcement Order No. DE 92TC-C108, and by conducting an  
19 independent investigation and cleanup. Although Ecology  
20 determined that CMX is a potentially liable person for purposes  
21 of implementing remedial actions at the Site, particularly the  
22 bottled water program, CMX has disputed this determination.  
23 Both parties seek to resolve this dispute through settlement  
24 rather than litigation.

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V. WORK TO BE PERFORMED

1. CMX, Inc. certifies that, pursuant to Ecology Enforcement Order No. DE 92TC-C108, it has contributed \$6,322.17 from July 1, 1992, through March 1993, for the supply of bottled water to residents within the Yakima Railroad area site.

2. Within sixty (60) days of the entry of this Decree, CMX will fill in and seal the sump with concrete or similar material. CMX will notify Ecology in writing of compliance with this provision.

3. CMX agrees that it will not seek reimbursement from the State of Washington, State or local toxics accounts, or other potentially liable parties (PLPs), who have or will be named, for any costs incurred prior to the entry of this Decree and pursuant or related to Enforcement Order DE 92TC-C108 or are expended to satisfy the terms of this Decree.

4. CMX, Inc. will provide access to the CMX Property in accordance with Section VI of this Consent Decree, and otherwise will comply with all other provisions of this Consent Decree.

5. Within ten (10) days of the entry of this Consent Decree by the Court, CMX, Inc. will dismiss with prejudice, each party bearing its own costs, the case of CMX, Inc. v. State of Washington, Department of Ecology, Cause No. 92-2-02060-1, which has been filed in the Superior Court of the State of Washington for the County of Yakima.

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**VI. ACCESS**

CMX will grant Ecology or any Ecology authorized representative reasonable access to the CMX Property for purposes of inspections, conducting such tests or collecting samples as Ecology may deem necessary as part of its RI/FS or remedial action at the Yakima Railroad Area Site. In the event that Ecology wishes to conduct sampling, Ecology will, except in emergency situations, provide CMX with five (5) days' notice prior to entering the CMX Property. Upon request, Ecology will split any samples taken at the CMX Property. All parties with access to the CMX Property pursuant to this paragraph shall comply with reasonable health and safety requirements.

The foregoing paragraph notwithstanding, Ecology shall not have access to privileged material and to the extent permitted by law, Ecology will maintain the confidentiality of proprietary information made available to Ecology.

**VII. RETENTION OF RECORDS**

CMX shall preserve for ten (10) years from the date of this Decree, all records, reports, documents, and underlying data in its possession relevant to the implementation of this Decree. Upon request of Ecology, CMX shall make all non-privileged, non-archived records available to Ecology and allow access for review. All non-privileged, archived records shall be made available to Ecology within a reasonable period of time.

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

2 Prior to transfer of any legal or equitable interest in all  
3 or any portion of the CMX Property, CMX shall serve a copy of  
4 this Decree and the attached Exhibits upon any purchaser,  
5 lessee, transferee, assignee, or other successor in interest of  
6 the property; and, at least thirty (30) days prior to any  
7 transfer, CMX shall notify Ecology of said transfer.

8 **IX. RESOLUTION OF DISPUTES**

9 If CMX objects to any Ecology disapproval, proposed  
10 modification, or decision made pursuant to this Decree, it shall  
11 notify Ecology in writing of its objections within fourteen (14)  
12 calendar days of receipt of such notice. Thereafter, the  
13 parties shall confer in an effort to resolve the dispute. If  
14 agreement cannot be reached on the dispute within fourteen (14)  
15 calendar days after receipt by Ecology of such objections,  
16 Ecology shall promptly provide a written statement of its  
17 decision to CMX.

18 If Ecology's final written decision is unacceptable to CMX,  
19 CMX has the right to submit the dispute within twenty (20) days  
20 to the Court for resolution. The parties agree that one judge  
21 should retain jurisdiction over this case and shall, as  
22 necessary, resolve any dispute arising under this Decree. In  
23 the event CMX presents an issue to the Court for review, the  
24 Court shall review the action or decision of Ecology on the  
25 basis of whether such action or decision was arbitrary and  
26 capricious and render a decision based on such standard of



1 review Ecology and CMX agree to only utilize the dispute  
2 resolution process in good faith and agree to expedite, to the  
3 extent possible, the dispute resolution process whenever it is  
4 used. Where either party utilizes the dispute resolution in bad  
5 faith or for purposes of delay, the other party may seek  
6 sanctions. Implementation of these dispute resolution  
7 procedures shall not provide a basis for delay of any activities  
8 required in this Decree, unless Ecology agrees in writing to a  
9 schedule extension or the Court so orders.

10 **X. AMENDMENT OF CONSENT DECREE**

11 This Decree may only be amended by a written stipulation  
12 between the parties, entered by the Court, or by court order.  
13 Such amendment shall become effective upon entry by the Court.  
14 Agreement to amend shall not be unreasonably withheld by any  
15 party to the Decree. CMX shall submit any request for an  
16 amendment to Ecology for approval. Ecology shall indicate its  
17 approval or disapproval within a reasonable time after the  
18 request for amendment is received. Reasons for the disapproval  
19 shall be stated in writing. If Ecology does not agree to any  
20 proposed amendment, the disagreement may be addressed through  
21 the dispute resolution procedures described in Section IX of  
22 this Decree. No guidance, suggestions, or comments by Ecology  
23 will be construed as relieving CMX of its obligation to obtain  
24 formal approval as may be required by this Decree. No verbal  
25 communication by Ecology shall relieve CMX of the obligations  
26 specified herein. Ecology shall notify CMX of any Ecology

1 requested amendment and, within fifteen (15) working days of  
2 receipt of such a request, CMX shall, in writing, indicate its  
3 agreement or disagreement and, if it disagrees, the rationale.  
4 If CMX does not agree with any Ecology proposed amendment, the  
5 disagreement may be addressed through the dispute resolution  
6 procedures described in Section IX of this Decree.

7 **XI. OTHER ACTIONS**

8 Ecology reserves its rights to institute remedial action(s)  
9 at the Site and/or the CMX Property, and subsequently pursue  
10 cost recovery, and to issue orders and/or penalties pursuant to  
11 available statutory authority, under the following  
12 circumstances:

- 13 1. Where CMX fails to adhere to any requirement of this  
14 Decree;
- 15 2. In the event or upon the discovery of a release or  
16 threatened release at the CMX Property not addressed by this  
17 Decree;
- 18 3. Upon Ecology's determination that action beyond the  
19 terms of this Decree is necessary to abate an emergency  
20 situation at the CMX Property which threatens the public health  
21 or welfare or the environment; or
- 22 4. Upon the occurrence or discovery of facts or  
23 conditions at the CMX Property beyond the scope of this Decree  
24 as to which Ecology would be empowered to perform any remedial  
25 action or to issue an order and/or penalty, or to take any other  
26 enforcement action under applicable laws.

1 CMX reserves its rights to all defenses and procedures as  
2 authorized by ch. 70.105D RCW, should Ecology take other actions  
3 described herein.

4 **XII. CONTRIBUTION PROTECTION**

5 With regard to claims for contribution against CMX (and  
6 Flat Top 8 Associates) for matters addressed in this Consent  
7 Decree, the parties hereto agree that CMX (and Flat Top 8  
8 Associates) are entitled to such protection from contribution as  
9 provided by law. For the purposes of this section, matters  
10 addressed shall mean the investigation and remediation of the  
11 Yakima Railroad area and the CMX Property with respect to the  
12 release or threatened release of PCE in soil or groundwater at  
13 the CMX Property, in the volume and toxicity described in  
14 Exhibit C.

15 **XIII. COVENANT NOT TO SUE**

16 In consideration of CMX's compliance with the terms and  
17 conditions of this Decree, Ecology agrees that compliance with  
18 this Decree shall stand in lieu of any and all administrative,  
19 legal, and equitable remedies and enforcement actions available  
20 to the State against CMX for the release or threatened release  
21 of a hazardous substance, known as PCE, in the amount and toxic-  
22 ity described in Exhibit C, including any enforcement rights  
23 Ecology may have regarding Enforcement Order DE 92TC-C108.  
24 Consistent with this Covenant Not to Sue, CMX is released from  
25 further liability under Enforcement Order DE 92TC-C108.

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1 This Covenant Not to Sue is strictly limited in its  
2 application to the CMX Property specifically defined in  
3 Exhibit B, and to the volume and toxicity of PCE described in  
4 Exhibit C. This covenant is not applicable to any other  
5 hazardous substance or area, and the State retains all of its  
6 authority relative to any other substances and areas.

7 A. Reopeners: In the following circumstances the State  
8 of Washington may exercise its full legal authority to address  
9 releases of hazardous substances at the CMX Property,  
10 notwithstanding the Covenant Not to Sue set forth above:

- 11 1. In the event CMX fails to comply with the terms and  
12 conditions of this Consent Decree, including all  
13 exhibits, and, after written notice of noncompliance,  
14 fails to come into compliance;
- 15 2. In the event information becomes available regarding  
16 factors previously unknown to Ecology, including the  
17 nature or quantity of hazardous substances at the CMX  
18 Property, and Ecology determines, in light of this  
19 information, that remedial action is necessary to  
20 address a release of hazardous substances at the CMX  
21 Property to protect human health or the environment.

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

- 24 1. Criminal liability;
- 25 2. Liability for damages to natural resources;

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- 1           3. Any Ecology action against potentially liable parties  
2           not a party to this Decree; and  
3           4. "Other Actions" described in Section XI of this  
4           Decree.  
5           C. This Covenant Not to Sue applies to Flat Top 8  
6 Associates to the same extent as it applies to CMX, Inc.

7                           **XIV. CLAIM AGAINST THE STATE**

8           CMX hereby agrees that it will not seek to recover any  
9 costs accrued in implementing this Decree or Enforcement Order  
10 DE 92TC-C108 from the State of Washington or any of its agencies  
11 and, further, that CMX will make no claim against the state  
12 toxics control account or any local toxics control account for  
13 any costs incurred in implementing this Decree or Enforcement  
14 Order DE 92TC-C108.

15                           **XV. RESERVATION OF RIGHTS**

16           By agreeing to the entry of this Decree, CMX and Ecology  
17 agree to abide by its terms. While the parties believe that the  
18 recitals contained in this Decree are accurate, the execution  
19 and performance of the Decree is not, however, an admission by  
20 CMX or Ecology of any fact or liability for any purpose other  
21 than as a foundation for the entry of this Decree. CMX's  
22 performance under the Decree is undertaken without waiver of or  
23 prejudice to any claims or defenses whatsoever that may be  
24 asserted in the event of further administrative proceedings or  
25 litigation not associated with, or related to, this Decree. Nor  
26 is the execution or the performance of the Decree an agreement

1 by CMX to take any action at the CMX Property or the Site other  
2 than that described in this document.

3 **XVI. EFFECTIVE DATE**

4 The effective date of this Consent Decree shall be the date  
5 upon which this Consent Decree is entered by the Court.

6 **XVII. DURATION OF DECREE AND RETENTION OF JURISDICTION**

7 This Decree shall remain in effect and this Court shall  
8 retain jurisdiction over both the subject matter of this Consent  
9 Decree and the parties for the duration of the performance of  
10 the terms and provisions of this Consent Decree for the purpose  
11 of enabling any of the parties to apply to the Court at any time  
12 for such further order, direction, and relief as may be  
13 necessary or appropriate to ensure that obligations of the  
14 parties have been satisfied.

15 **XVIII. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

16 This Decree has been the subject of public notice and  
17 comment under RCW 70.105D.040(4)(a). If the Court withholds or  
18 withdraws its consent, this Decree shall be null and void at the  
19 option of any party. In such an event, no party shall be bound  
20 by the requirements of this Decree.

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The undersigned parties enter into this De Minimis Consent Decree on the dates specified below.

DEPARTMENT OF ECOLOGY

CMX, INC.

By Carol L. Fleskes  
Carol L. Fleskes  
Toxics Cleanup Program  
Manager

By Roger A. van Valey  
Roger A van Valey  
President of CMX Corp.

Date: October 4, 1993

Date: Sept 8, 1993

ATTORNEY GENERAL'S OFFICE

FLAT TOP 8 ASSOCIATES,  
a Washington General Partnership

By E. Christina Beusch  
E. Christina Beusch  
WSBA #18226  
Assistant Attorney General

By Roger Van Valey  
Roger Van Valey  
Authorized General Partner

Date: 10/14/93

Date: Sept 8, 1993

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EXHIBIT A

Site Description of Yakima Railroad Area

That area bound northerly by Lincoln Avenue; easterly by the irregular trace of 4th Street to Pacific Ave., 10th Street to Nob Hill Boulevard, Rudkin Road to Valley Mall Boulevard, a line running due south from the southern end of Rudkin Road to the point it intersects a line running due east from the eastern end of Ahtanum Road; southerly by Ahtanum Road and the line extending due east from the eastern end of Ahtanum Road; and westerly by the irregular trace of 3rd Avenue to West Washington Avenue, 8th Avenue to Summitview Avenue, then Pierce Street to Lincoln Avenue, the northern boundary.

This area is shown on the map that constitutes Appendix 1 to Enforcement Order No. DE-92TC-C108.



EXHIBIT B

Legal Description of CMX Property

The legal description for the CMX property is as follows:

Tract 10, Carlson-Broadway Tracts, as recorded in Volume "K" of Plats, page 18, records of Yakima County, Washington, EXCEPT the North 3 feet thereof.

TOGETHER with all water rights thereunto belonging; SUBJECT to easements, exceptions, reservations, restrictions, and rights of way appearing of record and existing over and across said premises.

## EXHIBIT C

In January 1990, Ecology and Environment, Inc. prepared a screening site inspection report of CMX Corporation, Yakima, Washington, on behalf of the United States Environmental Protection Agency. (Hereinafter referred to as the EPA Report.) According to the report, the EPA Site Inspection process is intended to evaluate the actual and potential environmental or public health hazards at a particular site, relative to other sites across the nation, for the purposes of identifying remedial action priorities. The screening site inspection represents the initial phase of the site inspection process.

Section 2.1 of the EPA Report states that the CMX Corporation, Yakima Division, is located at 206 West Mead Avenue in Yakima, Washington. The CMX property has been leased by CMX, Inc. from the Flat Top 8 Associates since December 1984. Prior to 1984, the property was used as a plumbing shop for an unknown period of time. It is also believed that the property may have been used as a former automotive service station.

The Yakima CMX facility supplies photochemical solutions to local hospitals and clinics for X-ray units. CMX Yakima prepares solutions of X-ray developer and fixer, and distributes these solutions. The Yakima facility also

distributes prepackaged, ready-to-use photochemicals and X-ray film, and services X-ray units. In a letter dated March 26, 1993, Roger A. Van Valey, president of the CMX Corporation, has stated that solvents, which are the usual source of PCE, are not used in CMX's operations.

In preparation of its report, EPA conducted soil and groundwater sampling on the CMX property. EPA also sampled sediment that was found in a sump located within the CMX building. PCE was detected in the sump in only one sample at 240 ug/kg. EPA recommended that further research was necessary to determine if the CMX site is or was a contributor to area-wide PCE groundwater contamination.

Ecology notified CMX on September 5, 1991, of its potential liability under the Model Toxics Control Act (MTCA), based on an Ecology determination that there had been a release of PCE at CMX's property. On October 24, 1991, Ecology issued a "Determination of Potentially Liable Status" to CMX. Ecology issued an Enforcement Order effective February 11, 1992, directing CMX and other PLPs to finance an interim remedial action. The interim action consists of providing bottled water to designated households in the Yakima Railroad area where wells are potentially affected by PCE contamination.

On June 6, 1992, Ecology received a Report of Independent Action and Petition for Reimbursement of Costs from CMX. The

independent action report documented efforts by CMX to sample and subsequently clean the sump in question. Two hand-augured borings were completed adjacent to the sump. Soil samples were conducted in each of these borings. Results indicated that PCE was not present above the detection limit of 20 ppb. Additionally, the sediment removed from the sump was sampled by consultants for CMX, and no PCE was detected.

On November 12, 1993, Ecology completed construction of a flush mount monitoring well at the CMX facility. This monitoring well is located in the parking area south of the building, in which is located the sump. Sampling was conducted at the CMX facility. Two soil samples and one groundwater sample were taken. No PCE was detected. The results of this sampling are reported in "Investigation Of PLPs--Soil And Groundwater Contamination--Yakima Railroad Area--February 1993."

On or about March 25, 1993, Ecology representatives visited the CMX property in Yakima and inspected the sump. The cover of the sump was removed. The inside was dry and clean of sediment. The bottom of the sump and a portion of the sides of the sump are formed of concrete. A pipe, which did not appear to have been in use for many years, transected the upper portion of the sump. Randy Cluff, Yakima area manager, and Roger A. Van Valey, CMX Corporation President, have sworn and represented that the sump in question has not

been used by CMX for any purpose and that the room in which the sump is located is used for dry storage. (Sworn statement of Randy Cluff, April 1993; Letter of Roger A. Van Valey, dated March 26, 1993.)

The documents and reports referred to herein are available in the files of the Central Regional Office of the Washington State Department of Ecology, and are available for public review.

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