

Yakima RR  
Area  
FS 479

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

STATE OF WASHINGTON )  
DEPARTMENT OF ECOLOGY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BRIAR DEVELOPMENT COMPANY, )  
 )  
Defendant. )

DE MINIMIS  
CONSENT DECREE

No. 93 2 00291 0  
SUPERIOR COURT CLERK  
THURSTON COUNTY CLERK

AG # 93-00766

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- Exhibit A: Legal Description of Site  
Exhibit B: Legal Description of Briar Property  
Exhibit C: Cleanup Action Plan



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3 with respect to matters alleged in the complaint. Except as set  
4 forth herein, Defendant and Ecology retain the right to seek  
5 reimbursement in whole or in part from any responsible entities  
6 for sums expended pursuant to this Decree.

7 E. The Court is fully advised of the reasons for entry of  
8 this Decree, and good cause having been shown: IT IS HEREBY  
9 ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

10 I.

11 JURISDICTION AND VENUE

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

18 B. Authority is conferred upon the Washington State  
19 Attorney General by RCW 70.105D.040(4)(a) to agree to a settlement  
20 with any potentially liable person if, after public notice and  
21 hearing, Ecology finds the proposed settlement would lead to a  
22 more expeditious cleanup of hazardous substances in compliance  
23 with cleanup standards under RCW 70.105D.030(2)(d). RCW  
24 70.105D.040(4)(b) requires that such a settlement be entered as a  
25 consent decree issued by a court of competent jurisdiction.

26 C. Ecology has given notice to Defendant as provided in RCW  
27 70.105D.020(8), of Ecology's determination that Defendant is a  
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1  
2 potentially liable person for the Site and that there has been a  
3 release of hazardous substances at the Site.

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5 D. Ecology has determined that past activities at the Site  
6 have given rise to a release of hazardous substances, which  
7 requires remedial action pursuant to ch. 70.105D RCW. Defendant  
8 maintains that no such release has occurred at the Briar Property.

9 E. The actions to be taken pursuant to this Decree are  
10 necessary to protect the public health, welfare and the  
11 environment.

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

17 II.

18 PARTIES BOUND

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

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III.

DEFINITIONS

Unless otherwise specified, the definitions set forth in the Model Toxics Control Act, ch. 70.105D RCW, shall control the meaning of the terms used in this Consent Decree.

IV.

STATEMENT OF FACTS

The Briar Property - Site History attached to this Consent Decree as Exhibit C contains a detailed statement of facts regarding the history, description, and condition of the Briar Property. Based on the facts outlined in the site history and in Briar's Detailed Proposal for a Consent Decree, Ecology has determined that the release or potential release of hazardous substances at the Site requires remedial actions pursuant to ch. 70.105D RCW and that such actions can be facilitated by a settlement with Defendant. This Decree sets forth measures necessary to insure the protection of public health, welfare and the environment. Ecology has determined that Defendant is a potentially liable person for purposes of implementing the remedial actions described below. Defendant disputes this determination. Both parties seek to resolve this dispute through settlement rather than litigation.

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3 V.

4 WORK TO BE PERFORMED

5 A. Objectives of the Parties

6 The primary objective of the parties in entering into this  
7 consent Decree is to provide funds to Ecology to facilitate the  
8 implementation of a program designed to protect the public health  
9 and welfare and the environment from the known release, or  
10 threatened releases, of hazardous substances and pollutants at,  
11 on, or from the Site in a manner that avoids litigation of  
12 disputed issues.

13 B. Commitments by the Parties

14 1. Defendant agrees to pay Ecology the sum of \$60,000.00  
15 for remediation, investigation and other expenses incurred or to  
16 be incurred by Ecology in the Yakima Railroad Area in exchange for  
17 a full release from liability and covenant not to sue as set forth  
18 in this Consent Decree. Ecology agrees that Defendant may apply  
19 \$4,564.85 as a credit toward this amount representing payments  
20 made by Defendant through September 1992 for the bottled water  
21 program under Enforcement Order DE 92TC-C108. Ecology further  
22 agrees that Defendant may apply as a credit any additional  
23 payments made by Defendant for bottled water or to reimburse  
24 Ecology for administrative costs through the date this Consent  
25 Decree is entered.

26 2. Defendant agrees that it will not seek reimbursement  
27 from other Potentially Liable Parties (PLPs) for any costs  
28 incurred under Enforcement Order DE 92TC-C108.

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3 3. Within 20 business days after Defendant, through its  
4 attorneys, receives notice of the entry of the Consent Decree by  
5 the Court, Defendant shall make payment to Ecology of all amounts  
6 owing under this Consent Decree (after applying all credits  
7 allowed under paragraph V.B(1) above) in the form of a certified  
8 check payable to "Washington State Toxics Control Account,"  
9 referencing Yakima Railroad Area - Briar Property. Defendant  
10 shall send the check to:

11 Fiscal Cashier  
12 Department of Ecology  
13 P.O. Box 5128  
14 Lacey, WA 98503-0210

15 Defendant shall provide to Ecology at the time of payment a  
16 summary of all credits applied pursuant to paragraph V.B(1) above.

17 4. Ecology agrees that upon Defendant's payment of the  
18 amount set forth above Defendant's liability will terminate with  
19 respect to any pending administrative or other costs charged or  
20 claimed by Ecology under Enforcement Order DE 92TC-C108 as of the  
21 date of entry of the Consent Decree or thereafter.

22 VI.

23 ACCESS

24 Defendant will grant Ecology or any Ecology authorized  
25 representative reasonable access to the Briar Property for  
26 purposes of inspections, conducting such tests or collecting  
27 samples as Ecology may deem necessary as part of its RI/FS or  
28 remedial action at the Site. In the event that Ecology wishes to  
conduct sampling, Ecology will, except in emergency situations,



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3 provide Defendant with five (5) days' notice prior to entering the  
4 Briar Property. Upon request, Ecology will split any samples  
5 taken at the Briar Property. All parties with access to the Briar  
6 Property pursuant to this paragraph shall comply with reasonable  
7 health and safety requirements.

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

12 VII.

13 RETENTION OF RECORDS

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

21 VIII.

22 TRANSFER OF INTEREST IN PROPERTY

23 Prior to transfer of any legal or equitable interest in all  
24 or any portion of the Briar Property, Defendant shall serve a copy  
25 of this Decree and the attached Exhibits upon any purchaser,  
26 lessee, transferee, assignee, or other successor in interest of  
27 the property; and, at least thirty (30) days prior to any  
28 transfer, Defendant shall notify Ecology of said transfer.

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3 IX.

4 RESOLUTION OF DISPUTES

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

13 If Ecology's final written decision is unacceptable to  
14 Defendant, Defendant has the right to submit the dispute within  
15 twenty (20) days to the Court for resolution. The parties agree  
16 that one judge should retain jurisdiction over this case and  
17 shall, as necessary, resolve any dispute arising under this  
18 Decree. In the event Defendant presents an issue to the Court for  
19 review, the Court shall review the action or decision of Ecology  
20 on the basis of whether such action or decision was arbitrary and  
21 capricious and render a decision based on such standard of review.  
22 Ecology and Defendant agree to only utilize the dispute resolution  
23 process in good faith and agree to expedite, to the extent  
24 possible, the dispute resolution process whenever it is used.  
25 Where either party utilizes the dispute resolution in bad faith or  
26 for purposes of delay, the other party may seek sanctions.  
27 Implementation of these dispute resolution procedures shall not  
28 provide a basis for delay of any activities required in this

1  
2 Decree, unless Ecology agrees in writing to a schedule extension  
3 or the Court so orders.  
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5 X.

6 AMENDMENT OF CONSENT DECREE

7 This Decree may only be amended by a written stipulation  
8 between the parties, entered by the Court, or by Court order.  
9 Such amendment shall become effective upon entry by the Court.  
10 Agreement to amend shall not be unreasonably withheld by any party  
11 to the Decree. Defendant shall submit any request for an  
12 amendment to Ecology for approval. Ecology shall indicate its  
13 approval or disapproval within fifteen (15) working days after the  
14 request for amendment is received. Reasons for the disapproval  
15 shall be stated in writing. If Ecology does not agree to any  
16 proposed amendment, the disagreement may be addressed through the  
17 dispute resolution procedures described in Section IX of this  
18 Decree. No guidance, suggestions, or comments by Ecology will be  
19 construed as relieving Defendant of its obligation to obtain  
20 formal approval as may be required by this Decree. No verbal  
21 communication by Ecology shall relieve Defendant of the  
22 obligations specified herein. Ecology shall notify Defendant of  
23 any Ecology requested amendment and, within fifteen (15) working  
24 days of receipt of such a request, the Defendant shall, in  
25 writing, indicate its agreement or disagreement and, if it  
26 disagrees, the rationale. If Defendant does not agree with any  
27 Ecology proposed amendment, the disagreement may be addressed  
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1  
2 through the dispute resolution procedures described in Section IX  
3 of this Decree.  
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5 XI.

6 OTHER ACTIONS

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

11 1. Where Defendant fails to adhere to any requirement of  
12 this Decree;

13 2. In the event or upon the discovery of a release or  
14 threatened release at the Briar Property not addressed by this  
15 Decree, which Defendant, after notice, fails to address;

16 3. Upon Ecology's determination that action beyond the  
17 terms of this Decree is necessary to abate an emergency situation  
18 at the Briar Property which threatens the public health or welfare  
19 or the environment and which Defendant, after notice, fails to  
20 address; or

21 4. Upon the occurrence or discovery of facts or conditions  
22 at the Briar Property beyond the scope of this Decree as to which  
23 Ecology would be empowered to perform any remedial action or to  
24 issue an order and/or penalty, or to take any other enforcement  
25 action under applicable laws and which Defendant, after notice,  
26 fails to address.  
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3 XII.

4 CONTRIBUTION PROTECTION

5 With regard to claims for contribution against Defendant for  
6 matters addressed in this Consent Decree, the parties hereto agree  
7 that Defendant is entitled to such protection from contribution  
8 actions or claims as is provided by MTCA, RCW 70.105D.040, or as  
9 otherwise provided by law. For the purposes of this section,  
10 matters addressed shall mean the investigation and remediation of  
11 the Yakima Railroad Area and the Briar Property with respect to  
12 the release or threatened release of PCE in soil or groundwater as  
13 described in Exhibit C.

14 XIII.

15 COVENANT NOT TO SUE

16 In consideration of Defendant'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 to  
20 the state against Defendant for the release or threatened release  
21 of hazardous substances covered by the terms of this Decree.  
22 Ecology further agrees that no remedial action is required at the  
23 Briar Property to address any release or threatened release of PCE  
24 at the Briar Property.

25 This covenant not to sue is strictly limited in its  
26 application to the Briar Property specifically defined in Exhibit  
27 B and to those hazardous substances described in Exhibit C which  
28 Ecology knows to be located at the Briar Property as of the entry

1  
2 of this Decree. This Covenant is not applicable to any other  
3 hazardous substance or area and the state retains all of its  
4 authority relative to such substances and areas.  
5

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

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

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

- 25 1. Criminal liability;
- 26 2. Liability for damages to natural resources;
- 27 3. Any Ecology action against potentially liable parties  
28 not a party to this Decree.

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XIV.

CLAIM AGAINST THE STATE

Defendant hereby agrees that it will not seek to recover any costs accrued in implementing this Decree from the State of Washington or any of its agencies and, further, that the Defendant will make no claim against the state toxics control account or any local toxics control account for any costs incurred in implementing this Decree.

XV.

RESERVATION OF RIGHTS

By agreeing to the entry of this Decree, the Defendant and Ecology agree to abide by its terms. While the parties believe that the recitals contained in this Decree are accurate, the execution and performance of the Decree is not, however, an admission by the Defendant of any fact or liability for any purpose other than as a foundation for the entry of this Decree. Defendant's performance under the Decree is undertaken without waiver of or prejudice to any claims or defenses whatsoever that may be asserted in the event of further administrative proceedings or litigation not associated with, or related to, this Decree. Nor is the execution or the performance of the Decree an agreement by Defendant to take any action at the Briar Property or the Site other than that described in this document.

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3 XVI.

4 EFFECTIVE DATE

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

7 XVIII.

8 DURATION OF DECREE AND RETENTION OF JURISDICTION

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

17 XIX.

18 PUBLIC NOTICE AND WITHDRAWAL OF CONSENT

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

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



So ordered this 10 day of ~~December~~, 1992.

*February*

Danny J. Bensch

Judge  
Thurston County Superior Court  
DANIEL J. BERSCHAUER

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

DEPARTMENT OF ECOLOGY

BRIAR DEVELOPMENT COMPANY

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

By R. D. Hagen

Date: November 24, 1992

Date: November 19, 1992

and

By E. Christina Beusch 11/24/92  
E. Christina Beusch  
Assistant Attorney General

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

Description of Briar Property

The following property is located in Yakima County, Washington:

Beginning at a point 585.75 feet North of the Southeast corner of the Northwest Quarter of the Southwest Quarter of Section 32, Township 13 North, Range 19 East, W.M.; thence running North 734.25 feet, more or less, to the Northeast corner of said subdivision; thence running West to the Easterly line of the State Highway; thence in a Southeasterly direction along the Easterly line of the State Highway; thence in a Southeasterly direction along the Easterly line of the State Highway to a point due west of the point of beginning; thence running East to the point of beginning,

EXCEPT beginning at a point on the East line of the Northwest Quarter of the Southwest Quarter of said Section 32, 585.75 feet Northerly from the Southeast corner of said subdivision; thence North 88- 53' West along the North line of a tract of land described in Volume 272 of Deeds, Auditor's File No. 470149, records of Yakima County, Washington, 542 feet to an intersection with the Northeasterly right-of-way line of State Highway No. 3; thence North 37- 14' West along said right-of-way line 339.3 feet; thence South 89- 32' East, 751 feet, more or less, to a point on said East line of the subdivision 275 feet Northerly from the point of beginning; thence Southerly along said East line 275 feet to the point of beginning.

AND EXCEPT the North 100 feet of the following described tract: Beginning at a point where a line extended West from the Northeast corner of the Northwest Quarter of the Southeast Quarter of said Section 32, intersects the Easterly line of the State Highway; thence in a Southerly direction on said Easterly line of the State Highway to its intersection with a line parallel with the first named line, extending West from the Northeast corner, and 200 feet South from said line; thence East and parallel with the said first named line 200 feet; thence in a Northerly direction to a point on a line extended West from the Northeast corner of the Northwest Quarter of the Southwest Quarter of said Section 32, 200 feet East of the intersection of said line with the Easterly line of the State Highway; thence West 200 feet to the point of beginning.

AND EXCEPT roadways along the North and East thereof.

## EXHIBIT C

### Briar Property - Site History

#### I. Historical Use of the Property

In February 1988 Defendant contracted with Dames & Moore to conduct a Phase I Property Transfer Site Assessment prior to Defendant's purchase of the five lots constituting the Briar Property. Three buildings - a residence, a warehouse, and a drive-through restaurant - were located on two lots ("the Freer property") at the time Defendant purchased the five lots in 1988.

The historical record of the warehouse goes back to the 1940s and includes: cement block manufacturing business (1940 - 1946); hop picking and tractor sales/service shop (1940 - 1953); battery repair shop (1951 - 1959); retail welding supply (1954 - 1961); vacant (1961 - 1970s); fiberglass (two years in 1970s); and vacant (late 70s until demolition in 1988).

The drive-in restaurant was operated by the Freers from the 1950s through the 1980s. The Freers also operated Freer's Trophy House out of their residence from 1961 through 1988. Both the residence and the restaurant were demolished in 1988 after Briar purchased the Property.

The three other lots comprising Defendant's property were purchased by Al Frank in 1973. The largest lot, which occupies approximately three quarters of the property on the eastern side, was used as pasture land in the 1940s and 1950s. Aerial photographs of the area over the years show no evidence of any buildings on this parcel, until Mr. Frank purchased the property. A residence located on a lot north of the warehouse was demolished in 1973 and the debris was buried on the property. Mr. Frank

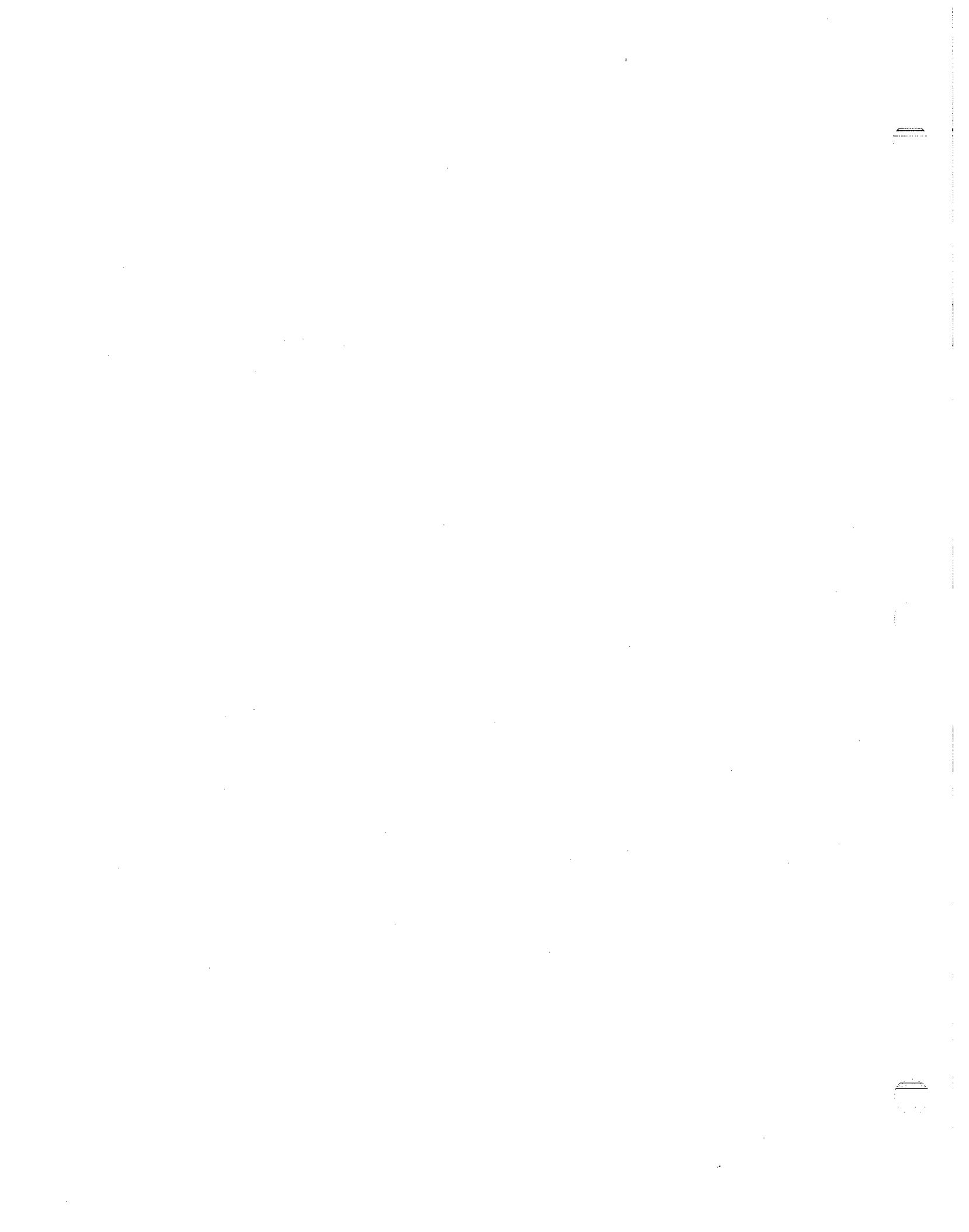
leased his property, including part of the larger parcel to the east, to Crown Mobile Homes. Approximately 30 mobile homes were located on the property in the 1980s.

After acquiring the property in 1988, Defendant built the TOP Foods store on the large eastern parcel. The four remaining parcels are currently undeveloped.

## II. Enforcement Background

By letter dated September 30, 1991, Ecology notified Defendant of potential liability under the Model Toxics Control Act based on a determination that there had been a "release" of Perchloroethylene (PCE) "in measurable quantities" at Defendant's property at the southeast corner of South First Street and East Washington Avenue. By letter dated November 4, 1991, Defendant objected to Ecology's notice of potential liability on grounds that there was not credible evidence of a release of PCE on Defendant's property. Ecology issued a "Determination of Potentially Liable Person Status" on November 8, 1991. Ecology issued an enforcement order effective February 11, 1992, directing Defendant and other respondents to finance an "interim remedial action" consisting of providing bottled water to designated household with wells potentially affected by PCE contamination.

In its enforcement order, Ecology listed lots 191332-32001, -32003, -32004, -32006, -32007 as numbered by the Yakima County Tax Assessor as a "facility" owned by Defendant that was subject to the provisions of MTCA. A TOP Foods store is presently located on lot 191332-32001 of the Property. The street address for this store is 2203 South First Street, Yakima. The other lots have been cleared and graded but remain undeveloped.



Briar Property  
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FOR THURSTON COUNTY

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7 E. The Court is fully advised of the reasons for entry of  
8 this Decree, and good cause having been shown: IT IS HEREBY  
9 ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

10 I.

11 JURISDICTION AND VENUE

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

18 B. Authority is conferred upon the Washington State  
19 Attorney General by RCW 70.105D.040(4)(a) to agree to a settlement  
20 with any potentially liable person if, after public notice and  
21 hearing, Ecology finds the proposed settlement would lead to a  
22 more expeditious cleanup of hazardous substances in compliance  
23 with cleanup standards under RCW 70.105D.030(2)(d). RCW  
24 70.105D.040(4)(b) requires that such a settlement be entered as a  
25 consent decree issued by a court of competent jurisdiction.

26 C. Ecology has given notice to Defendant as provided in RCW  
27 70.105D.020(8), of Ecology's determination that Defendant is a  
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1  
2 potentially liable person for the Site and that there has been a  
3 release of hazardous substances at the Site.  
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5 D. Ecology has determined that past activities at the Site  
6 have given rise to a release of hazardous substances, which  
7 requires remedial action pursuant to ch. 70.105D RCW. Defendant  
8 maintains that no such release has occurred at the Briar Property.

9 E. The actions to be taken pursuant to this Decree are  
10 necessary to protect the public health, welfare and the  
11 environment.

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

17 II.

18 PARTIES BOUND

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

4 DEFINITIONS

5 Unless otherwise specified, the definitions set forth in the  
6 Model Toxics Control Act, ch. 70.105D RCW, shall control the  
7 meaning of the terms used in this Consent Decree.

8 IV.

9 STATEMENT OF FACTS

10 The Briar Property - Site History attached to this Consent  
11 Decree as Exhibit C contains a detailed statement of facts  
12 regarding the history, description, and condition of the Briar  
13 Property. Based on the facts outlined in the site history and in  
14 Briar's Detailed Proposal for a Consent Decree, Ecology has  
15 determined that the release or potential release of hazardous  
16 substances at the Site requires remedial actions pursuant to ch.  
17 70.105D RCW and that such actions can be facilitated by a  
18 settlement with Defendant. This Decree sets forth measures  
19 necessary to insure the protection of public health, welfare and  
20 the environment. Ecology has determined that Defendant is a  
21 potentially liable person for purposes of implementing the  
22 remedial actions described below. Defendant disputes this  
23 determination. Both parties seek to resolve this dispute through  
24 settlement rather than litigation.  
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3 V.

4 WORK TO BE PERFORMED

5 A. Objectives of the Parties

6 The primary objective of the parties in entering into this  
7 consent Decree is to provide funds to Ecology to facilitate the  
8 implementation of a program designed to protect the public health  
9 and welfare and the environment from the known release, or  
10 threatened releases, of hazardous substances and pollutants at,  
11 on, or from the Site in a manner that avoids litigation of  
12 disputed issues.

13 B. Commitments by the Parties

14 1. Defendant agrees to pay Ecology the sum of \$60,000.00  
15 for remediation, investigation and other expenses incurred or to  
16 be incurred by Ecology in the Yakima Railroad Area in exchange for  
17 a full release from liability and covenant not to sue as set forth  
18 in this Consent Decree. Ecology agrees that Defendant may apply  
19 \$4,564.85 as a credit toward this amount representing payments  
20 made by Defendant through September 1992 for the bottled water  
21 program under Enforcement Order DE 92TC-C108. Ecology further  
22 agrees that Defendant may apply as a credit any additional  
23 payments made by Defendant for bottled water or to reimburse  
24 Ecology for administrative costs through the date this Consent  
25 Decree is entered.

26 2. Defendant agrees that it will not seek reimbursement  
27 from other Potentially Liable Parties (PLPs) for any costs  
28 incurred under Enforcement Order DE 92TC-C108.

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3 3. Within 20 business days after Defendant, through its  
4 attorneys, receives notice of the entry of the Consent Decree by  
5 the Court, Defendant shall make payment to Ecology of all amounts  
6 owing under this Consent Decree (after applying all credits  
7 allowed under paragraph V.B(1) above) in the form of a certified  
8 check payable to "Washington State Toxics Control Account,"  
9 referencing Yakima Railroad Area - Briar Property. Defendant  
10 shall send the check to:

11 Fiscal Cashier  
12 Department of Ecology  
13 P.O. Box 5128  
14 Lacey, WA 98503-0210

15 Defendant shall provide to Ecology at the time of payment a  
16 summary of all credits applied pursuant to paragraph V.B(1) above.

17 4. Ecology agrees that upon Defendant's payment of the  
18 amount set forth above Defendant's liability will terminate with  
19 respect to any pending administrative or other costs charged or  
20 claimed by Ecology under Enforcement Order DE 92TC-C108 as of the  
21 date of entry of the Consent Decree or thereafter.

22 VI.

23 ACCESS

24 Defendant will grant Ecology or any Ecology authorized  
25 representative reasonable access to the Briar Property for  
26 purposes of inspections, conducting such tests or collecting  
27 samples as Ecology may deem necessary as part of its RI/FS or  
28 remedial action at the Site. In the event that Ecology wishes to  
conduct sampling, Ecology will, except in emergency situations,

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2 provide Defendant with five (5) days' notice prior to entering the  
3 Briar Property. Upon request, Ecology will split any samples  
4 taken at the Briar Property. All parties with access to the Briar  
5 Property pursuant to this paragraph shall comply with reasonable  
6 health and safety requirements.

7  
8 The foregoing paragraph notwithstanding, Ecology shall not  
9 have access to privileged material and to the extent permitted by  
10 law, Ecology will maintain the confidentiality of proprietary  
11 information made available to Ecology.

12 VII.

13 RETENTION OF RECORDS

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

21 VIII.

22 TRANSFER OF INTEREST IN PROPERTY

23 Prior to transfer of any legal or equitable interest in all  
24 or any portion of the Briar Property, Defendant shall serve a copy  
25 of this Decree and the attached Exhibits upon any purchaser,  
26 lessee, transferee, assignee, or other successor in interest of  
27 the property; and, at least thirty (30) days prior to any  
28 transfer, Defendant shall notify Ecology of said transfer.

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3 IX.

4 RESOLUTION OF DISPUTES

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

13 If Ecology's final written decision is unacceptable to  
14 Defendant, Defendant has the right to submit the dispute within  
15 twenty (20) days to the Court for resolution. The parties agree  
16 that one judge should retain jurisdiction over this case and  
17 shall, as necessary, resolve any dispute arising under this  
18 Decree. In the event Defendant presents an issue to the Court for  
19 review, the Court shall review the action or decision of Ecology  
20 on the basis of whether such action or decision was arbitrary and  
21 capricious and render a decision based on such standard of review.  
22 Ecology and Defendant agree to only utilize the dispute resolution  
23 process in good faith and agree to expedite, to the extent  
24 possible, the dispute resolution process whenever it is used.  
25 Where either party utilizes the dispute resolution in bad faith or  
26 for purposes of delay, the other party may seek sanctions.  
27 Implementation of these dispute resolution procedures shall not  
28 provide a basis for delay of any activities required in this



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2 Decree, unless Ecology agrees in writing to a schedule extension  
3 or the Court so orders.  
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5 X.

6 AMENDMENT OF CONSENT DECREE

7 This Decree may only be amended by a written stipulation  
8 between the parties, entered by the Court, or by Court order.  
9 Such amendment shall become effective upon entry by the Court.  
10 Agreement to amend shall not be unreasonably withheld by any party  
11 to the Decree. Defendant shall submit any request for an  
12 amendment to Ecology for approval. Ecology shall indicate its  
13 approval or disapproval within fifteen (15) working days after the  
14 request for amendment is received. Reasons for the disapproval  
15 shall be stated in writing. If Ecology does not agree to any  
16 proposed amendment, the disagreement may be addressed through the  
17 dispute resolution procedures described in Section IX of this  
18 Decree. No guidance, suggestions, or comments by Ecology will be  
19 construed as relieving Defendant of its obligation to obtain  
20 formal approval as may be required by this Decree. No verbal  
21 communication by Ecology shall relieve Defendant of the  
22 obligations specified herein. Ecology shall notify Defendant of  
23 any Ecology requested amendment and, within fifteen (15) working  
24 days of receipt of such a request, the Defendant shall, in  
25 writing, indicate its agreement or disagreement and, if it  
26 disagrees, the rationale. If Defendant does not agree with any  
27 Ecology proposed amendment, the disagreement may be addressed  
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2 through the dispute resolution procedures described in Section IX  
3 of this Decree.  
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5 XI.

6 OTHER ACTIONS

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

11 1. Where Defendant fails to adhere to any requirement of  
12 this Decree;

13 2. In the event or upon the discovery of a release or  
14 threatened release at the Briar Property not addressed by this  
15 Decree, which Defendant, after notice, fails to address;

16 3. Upon Ecology's determination that action beyond the  
17 terms of this Decree is necessary to abate an emergency situation  
18 at the Briar Property which threatens the public health or welfare  
19 or the environment and which Defendant, after notice, fails to  
20 address; or

21 4. Upon the occurrence or discovery of facts or conditions  
22 at the Briar Property beyond the scope of this Decree as to which  
23 Ecology would be empowered to perform any remedial action or to  
24 issue an order and/or penalty, or to take any other enforcement  
25 action under applicable laws and which Defendant, after notice,  
26 fails to address.  
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3 XII.

4 CONTRIBUTION PROTECTION

5 With regard to claims for contribution against Defendant for  
6 matters addressed in this Consent Decree, the parties hereto agree  
7 that Defendant is entitled to such protection from contribution  
8 actions or claims as is provided by MTCA, RCW 70.105D.040, or as  
9 otherwise provided by law. For the purposes of this section,  
10 matters addressed shall mean the investigation and remediation of  
11 the Yakima Railroad Area and the Briar Property with respect to  
12 the release or threatened release of PCE in soil or groundwater as  
13 described in Exhibit C.

14 XIII.

15 COVENANT NOT TO SUE

16 In consideration of Defendant'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 to  
20 the state against Defendant for the release or threatened release  
21 of hazardous substances covered by the terms of this Decree.

22 Ecology further agrees that no remedial action is required at the  
23 Briar Property to address any release or threatened release of PCE  
24 at the Briar Property.

25 This covenant not to sue is strictly limited in its  
26 application to the Briar Property specifically defined in Exhibit  
27 B and to those hazardous substances described in Exhibit C which  
28 Ecology knows to be located at the Briar Property as of the entry

1  
2 of this Decree. This Covenant is not applicable to any other  
3 hazardous substance or area and the state retains all of its  
4 authority relative to such substances and areas.  
5

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

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

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

- 25 1. Criminal liability;
- 26 2. Liability for damages to natural resources;
- 27 3. Any Ecology action against potentially liable parties  
28 not a party to this Decree.

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XIV.

CLAIM AGAINST THE STATE

Defendant hereby agrees that it will not seek to recover any costs accrued in implementing this Decree from the State of Washington or any of its agencies and, further, that the Defendant will make no claim against the state toxics control account or any local toxics control account for any costs incurred in implementing this Decree.

XV.

RESERVATION OF RIGHTS

By agreeing to the entry of this Decree, the Defendant and Ecology agree to abide by its terms. While the parties believe that the recitals contained in this Decree are accurate, the execution and performance of the Decree is not, however, an admission by the Defendant of any fact or liability for any purpose other than as a foundation for the entry of this Decree. Defendant's performance under the Decree is undertaken without waiver of or prejudice to any claims or defenses whatsoever that may be asserted in the event of further administrative proceedings or litigation not associated with, or related to, this Decree. Nor is the execution or the performance of the Decree an agreement by Defendant to take any action at the Briar Property or the Site other than that described in this document.

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3 XVI.

4 EFFECTIVE DATE

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

7 XVII.

8 DURATION OF DECREE AND RETENTION OF JURISDICTION

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

17 XVIII.

18 PUBLIC NOTICE AND WITHDRAWAL OF CONSENT

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

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

So ordered this 10 day of ~~December~~ <sup>February</sup>, 1992. <sup>3</sup>

Danny J. Berman

Judge  
Thurston County Superior Court  
**DANIEL J. BERSCHAUER**

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

DEPARTMENT OF ECOLOGY

BRIAR DEVELOPMENT COMPANY

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

By D. Hager

Date: November 24, 1992

Date: November 19, 1992

and

By E. Christina Beusch 11/24/92  
E. Christina Beusch  
Assistant Attorney General

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

Description of Briar Property

The following property is located in Yakima County, Washington:

Beginning at a point 585.75 feet North of the Southeast corner of the Northwest Quarter of the Southwest Quarter of Section 32, Township 13 North, Range 19 East, W.M.; thence running North 734.25 feet, more or less, to the Northeast corner of said subdivision; thence running West to the Easterly line of the State Highway; thence in a Southeasterly direction along the Easterly line of the State Highway; thence in a Southeasterly direction along the Easterly line of the State Highway to a point due west of the point of beginning; thence running East to the point of beginning,

EXCEPT beginning at a point on the East line of the Northwest Quarter of the Southwest Quarter of said Section 32, 585.75 feet Northerly from the Southeast corner of said subdivision; thence North 88- 53' West along the North line of a tract of land described in Volume 272 of Deeds, Auditor's File No. 470149, records of Yakima County, Washington, 542 feet to an intersection with the Northeasterly right-of-way line of State Highway No. 3; thence North 37- 14' West along said right-of-way line 339.3 feet; thence South 89- 32' East, 751 feet, more or less, to a point on said East line of the subdivision 275 feet Northerly from the point of beginning; thence Southerly along said East line 275 feet to the point of beginning.

AND EXCEPT the North 100 feet of the following described tract: Beginning at a point where a line extended West from the Northeast corner of the Northwest Quarter of the Southeast Quarter of said Section 32, intersects the Easterly line of the State Highway; thence in a Southerly direction on said Easterly line of the State Highway to its intersection with a line parallel with the first named line, extending West from the Northeast corner, and 200 feet South from said line; thence East and parallel with the said first named line 200 feet; thence in a Northerly direction to a point on a line extended West from the Northeast corner of the Northwest Quarter of the Southwest Quarter of said Section 32, 200 feet East of the intersection of said line with the Easterly line of the State Highway; thence West 200 feet to the point of beginning.

AND EXCEPT roadways along the North and East thereof.

## EXHIBIT C

### Briar Property - Site History

#### I. Historical Use of the Property

In February 1988 Defendant contracted with Dames & Moore to conduct a Phase I Property Transfer Site Assessment prior to Defendant's purchase of the five lots constituting the Briar Property. Three buildings - a residence, a warehouse, and a drive-through restaurant - were located on two lots ("the Freer property") at the time Defendant purchased the five lots in 1988.

The historical record of the warehouse goes back to the 1940s and includes: cement block manufacturing business (1940 - 1946); hop picking and tractor sales/service shop (1940 - 1953); battery repair shop (1951 - 1959); retail welding supply (1954 - 1961); vacant (1961 - 1970s); fiberglass (two years in 1970s); and vacant (late 70s until demolition in 1988).

The drive-in restaurant was operated by the Freers from the 1950s through the 1980s. The Freers also operated Freer's Trophy House out of their residence from 1961 through 1988. Both the residence and the restaurant were demolished in 1988 after Briar purchased the Property.

The three other lots comprising Defendant's property were purchased by Al Frank in 1973. The largest lot, which occupies approximately three quarters of the property on the eastern side, was used as pasture land in the 1940s and 1950s. Aerial photographs of the area over the years show no evidence of any buildings on this parcel, until Mr. Frank purchased the property. A residence located on a lot north of the warehouse was demolished in 1973 and the debris was buried on the property. Mr. Frank

leased his property, including part of the larger parcel to the east, to Crown Mobile Homes. Approximately 30 mobile homes were located on the property in the 1980s.

After acquiring the property in 1988, Defendant built the TOP Foods store on the large eastern parcel. The four remaining parcels are currently undeveloped.

## II. Enforcement Background

By letter dated September 30, 1991, Ecology notified Defendant of potential liability under the Model Toxics Control Act based on a determination that there had been a "release" of Perchloroethylene (PCE) "in measurable quantities" at Defendant's property at the southeast corner of South First Street and East Washington Avenue. By letter dated November 4, 1991, Defendant objected to Ecology's notice of potential liability on grounds that there was not credible evidence of a release of PCE on Defendant's property. Ecology issued a "Determination of Potentially Liable Person Status" on November 8, 1991. Ecology issued an enforcement order effective February 11, 1992, directing Defendant and other respondents to finance an "interim remedial action" consisting of providing bottled water to designated household with wells potentially affected by PCE contamination.

In its enforcement order, Ecology listed lots 191332-32001, -32003, -32004, -32006, -32007 as numbered by the Yakima County Tax Assessor as a "facility" owned by Defendant that was subject to the provisions of MTCA. A TOP Foods store is presently located on lot 191332-32001 of the Property. The street address for this store is 2203 South First Street, Yakima. The other lots have been cleared and graded but remain undeveloped.

### III. Scientific Evidence of PCE Release

Dames & Moore conducted a Phase II Environmental Assessment of Defendant's property in August of 1988. After Defendant was notified by Ecology of its status as a potentially liable person under MTCA, Dames & Moore reviewed the data relating to Defendant's property and submitted a supplemental report to Ecology on November 1, 1991.

#### Groundwater Data

The groundwater beneath Defendant's property is contaminated with PCE. Three groundwater samples taken on March 18, 1988, each contained detectable quantities of PCE. PCE was detected at a level of 6.4  $\mu\text{g}/\ell$  in an upgradient groundwater sample from a boring on Defendant's property. PCE was detected at concentrations of 5.4 and 3.1  $\mu\text{g}/\ell$  in two downgradient groundwater samples from borings on Defendant's property.

A report prepared by Sweet-Edwards\EMCON ("Sweet-Edwards") for U-Haul Company of Inland Northwest dated October 8, 1991, contains an analysis of data on PCE contamination in the Yakima Railroad Area.

#### Soil Data

Eight soil samples from Defendant's property were analyzed by Dames & Moore in March, 1988. Only one showed any measurable level of PCE. PCE was detected at a concentration of 0.06 mg/kg in that sample. This concentration is less than the concentration of the MTCA's Method A cleanup standard for PCE in soil, 0.5 mg/kg. PCE was detected only in a soil sample taken from beneath the concrete floor of the warehouse. The sample was taken by boring a hole in the floor which was intact at the time.

Defendant is not aware of any other technical data available regarding PCE contamination at Defendant's property.

Based on the above, it is Defendant's position that (1) a disperse dilute contaminate plume of PCE has migrated downgradient across Defendant's property from an off-site source, (2) the PCE detected in the one soil sample under the concrete slab was the result of off-gassing and entrapment of volatile PCE from the groundwater, and (3) there has not been a release of PCE to the groundwater from Defendant's property. Ecology disagrees with Defenant's position.

HI948VP11062.KEM

