Washington State Department of Ecology

Response to Public Comment
on the
Draft Consent Decree
Moses Lake Wellfield Superfund Site
Grant County, Washington

February 2007

Introduction

A draft Consent Decree between the City of Moses Lake (City) Grant County WA and the Washington State Department of Ecology (Ecology) was issued for public comment on October 3, 2006. The public comment period was extended at the request of the public from 30 days to 37 days and closed on November 10, 2006. This document summarizes the comments received from the public and provides response to these documents from Ecology.

Comments pertaining to the proposed Decree are excerpted or summarized in this document along with Ecology's response to the comments. Copies of the comment letters are also attached. Generally, Ecology has not responded to specific comments pertaining to stages of the cleanup or other actions that are either not a part of this draft Consent Decree or fall outside the agency's jurisdiction. Ecology has considered all comments on the Decree and made minor modifications as appropriate. After careful consideration of comments received, Ecology determined that no significant changes to the Decree were needed.

Public involvement activities related to this public comment period included:

1. Distributing a fact sheet describing the Site and the draft Consent Decree through a mailing to over 300 addresses in the area and other interested parties.
2. Publication of a paid display ad in the following area newspaper: *The Columbia Basin Herald.*
3. Publication of notice in the Washington State Site Register.
4. Publication of notice in the Ecology Public Involvement Calendar.
5. Posting of the draft Consent Decree on the Ecology web site.
6. Providing copies of the draft Consent Decree through information repositories at Ecology's Headquarters Office and Big Bend Community College Library.

A total of 3 persons provided comment through letters, and e-mail messages.
In the comment section, each commenter is referenced by an assigned commenter number.

List of Commenters:

Perkins Coie for the Boeing Company (1)
Gibson, Dunn & Cruther LLP for the Lockheed Martin Corporation (2)
Chris Overland (3)

From Commenter 1:

1. Findings of fact V.I. and V.J. {of the Consent Decree] should be deleted because they improperly address alleged operations of Boeing and do not further any purpose of the Consent Decree.

Ecology responses to comment--All references to Boeing and/or Lockheed have been removed from the Statement of Facts Section.

2. If the Department of Ecology does include findings of facts related to Boeing, Part V.I. of the draft Consent Decree may be interpreted to imply that Ecology has found that Boeing occupies property on which TCE groundwater contamination has been detected. Such an implication would be incorrect. If any finding related to Boeing's operations remains in the Consent Decree, we request that the first sentence of Part V.I. be revised to read in one the following alterative ways:
    a. The Boeing Comply (Boeing) and a predecessor of Lockheed Marin Company also had operations near the City of Moses Lake.
    b. The City of Moses Lake contends that The Boeing Company (Boeing) and a predecessor of Lockheed Martin Company also occupied the site.

Ecology response to comment-- All references to Boeing and/or Lockheed have been removed from the Statement of Facts Section.

3. Part V.J. should be deleted because it is incorrect.

Ecology response to comment-- All references to Boeing and/or Lockheed have been removed from the Statement of Facts Section. If there was some additional concern regarding this section, Ecology believes that it also has been corrected by removing most, if not all of the text of this .

From Commenter 2

1. Lockheed Martin did not use, handle, store or dispose of TCE at Larson Air Force Base

Ecology responses to comment-- All references to Boeing and/or Lockheed have been removed from the Statement of Facts Section. If there was some additional concern regarding this section, Ecology believes that it also has been corrected by removing most, if not all of the text of this paragraph.

2. Ecology has improperly taken sides in the dispute over who is responsible for contamination at the site without sufficient knowledge of the facts.

Ecology responses to comment-- All references to Boeing and/or Lockheed have been removed from the Statement of Facts Section. If there was some additional concern regarding this section, Ecology believes that it also has been corrected by removing most, if not all of the text of this paragraph.

From Commenter 3

1. Why is Ecology preparing to enter into the draft Consent Decree agreement with the City at the present time?

Ecology response to comment---Ecology has the discretion to enter into a consent decree, agreed order, or enforcement order at any time during the cleanup process and further investigate the site.

2. Precisely what is the current and future risk of TCE within the water system?

Ecology response to comment--This comment is not within the scope of the draft Consent Decree. Please contact the EPA for this information at the following web site: http://yosemite.epa.gov/r10/cleanup.nsf/sites/moses.

3. What will Ecology's oversight role be in the future where ongoing monitoring of the City is concerned to ensure that the proper things are being done to protect water system consumers?

Ecology response to comment-- Ecology will provide review and comment (as needed) on the Proposed Plan and the Record of Decision for this site.

Perkins Coie

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206 359 8000
FAX: 206 359 9000
www.perkinscoie.com

Mark W. Schneider
PHONE: (206) 359-8627
FAX: (206) 359-9627

October 30, 2006

Mr. Barry Rogowski
Site Manager
Washington Department of Ecology
Toxics Cleanup Program
300 Desmond Drive
Lacey, WA 98504-7600

Re: Comments on Draft Consent Decree
Moses Lake Wellfield Contamination Superfund Site
Public Comment Period: Oct. 3, 2006-Nov. 3, 2006

Dear Mr. Rogowski:

On behalf of The Boeing Company, I am providing three comments on the proposed Consent Decree between the Washington State Department of Ecology and City of Moses Lake.

1. The proposed Consent Decree contains the Department of Ecology's findings of fact that improperly address alleged operations of Boeing. The Consent Decree is between the Department of Ecology and the City of Moses Lake and resolves Ecology's demand to the City for payment of Ecology's past CERCLA environmental oversight costs at the Moses Lake Wellfield Contamination Superfund Site. The Consent Decree has nothing to do with Boeing, and should not contain any reference to Boeing. The Consent Decree says nothing about operations of the remaining 21 PRPs identified by the EPA, nor does it mention the additional 89 "unconfirmed" PRPs identified by the EPA. Findings of fact V.I. and V.J. should be deleted because they improperly address alleged operations of Boeing and do not further any purpose of the Consent Decree.

2. If the Department of Ecology does include findings of fact related to Boeing, Part V.I. of the draft Consent Decree may be interpreted to imply that Ecology has found that Boeing occupies property on which TCE groundwater contamination has been detected. Such an implication would be incorrect. If any finding related to Boeing's operations remains in the Consent Decree, we request that the first sentence of Part V.I. be revised to read in one of the following alternative ways:

The Boeing Company (Boeing) and a predecessor of Lockheed Martin Company also had operations near the City of Moses Lake.

or

The City of Moses Lake contends that The Boeing Company (Boeing) and a predecessor of Lockheed Martin Company also occupied the Site.

3. Part V.J should be deleted because it is incorrect.

If Ecology does not intend to make these changes, please let me know as soon as possible so that Boeing may determine what additional steps it may need to take to protect its interests.

Thank you for your consideration.

Very truly yours,

Mark W. Schneider

cc: The Boeing Company
Michael L. Dunning, Esq.

Caldwell, Sandra (ECY)

From: Chris Overland [cover@nctv.com]
Sent: Thursday, November 30, 2006 9:13 PM
To: Caldwell, Sandra
Subject: RE: Moses Lake Wellfield Superfund site

Thanks Sandra - appreciate the reply.

Is there still a substantial risk involved with the drinking water on the south side of the former Larson Air Force Base? I'm just looking for an opinion... Having children using a contaminated system concerns me and as I mentioned, I was under the 'assumption' that this issue had been effectively addressed years ago.

Regards,

Chris Overland

At 10:38 AM 11/30/2006 -0800, you wrote:
>Dear Mr. Overland,
>
>Thank you for your request for more information on the Moses Lake
>Wellfield Superfund site. EPA is the lead agency for the cleanup of this
>site. You may refer to the website below to follow the progress of the
>clean up and to find EPA contact personnel to direct further questions.
> http://yosemite.epa.gov/r10/cleanup.nsf/sites/moses
>
>The Model Toxics Control Act requires that Ecology notify the public of
>its cleanup activities through direct mailings. I will however retain
>your email address and contact you when there are further updates to
>Ecology's Moses Lake Wellfield Superfund web site referenced below.
>http://www.ecy.wa.gov/programs/tcp/sites/moses_lake_wellfield/moses_lake
>_wellfield_hp.htm
>
>
>Sincerely,
>
>Sandra
>
>
>Sandra Caldwell
>WA Dept of Ecology
>Toxics Cleanup program- Land Unit
>saca461@ecy.wa.gov
>(360) 407-7209
>"the cure for anything is saltwater- -sweat, tears, or the sea"
>-Isak Dinesen (pseudonym of Karen Blixen)
>
>
>
>
>-----Original Message-----
>From: Chris Overland [mailto:cover@nctv.com]
>Sent: Thursday, November 09, 2006 6:46 AM
>To: Rogowski, Barry
>Cc: Caldwell, Sandra
>Subject: Moses Lake Wellfield Superfund site
>
>Dear Mr. Rogowski,
>
>I haven't visited the local library where the documents on the Moses
>Lake
>Wellfield are on public display for comment however, I am assuming they

>are
>the same documents as located at the website
>http://www.ecy.wa.gov/programs/tcp/sites/moses_lake_wellfield/moses_lake
>_wellfield_hp.htm
>of which I just viewed. If there is some difference between the site
>docs
>versus those at the library, please advise and I'll make it a point to
>get
>out to the library.
>
>I'm a little unclear on precisely what type of comments Ecology is
>seeking. Frankly and perhaps naively, I was under the impression this
>TCE
>matter within the drinking water had been satisfactorily and permanently
>
>addressed some time ago and am now left with an impression from the
>documents that, Ecology is attempting to terminate it's involvement with
>
>the City and is seeking reimbursement for their involvement with the
>project AND THAT the TCE issue is still a significant issue. Is this
>impression correct?
>
>Related to the Draft Consent Decree, Why is Ecology preparing to enter
>into
>the Consent Decree agreement with the City at the present time? A
>couple
>of other questions that come to mind, precisely what is the current and
>future risk of TCE within the water system and what will Ecology's
>oversight role be in the future where ongoing monitoring of the City is
>concerned to ensure that the proper things are being done to protect
>water
>system consumers.
>
>Look forward to hearing from you - Sandra Caldwell, please place my
>email
>on the mailing list.
>
>Best Regards,
>
>Chris Overland

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

4 Park Plaza Irvine, California 92614-8557
(949) 451-3800
www.gibsondunn.com

RLoewen@gibsondunn.com

November 10, 2006

Direct Dial
(949) 451-3894
Fax No.
(949) 475-4645

Client No.
T 54253-00237

VIA ELECTRONIC & OVERNIGHT DELIVERY

Mr. Barry Rogowski
Site Manager
Washington Department of Ecology
Toxics Cleanup Program
300 Desmond Drive
Lacey, WA 98504-7600

Re: *Moses Lake Wellfield Superfund Site*

Dear Mr. Rogowski:

On behalf of our client, Lockheed Martin Corporation ("Lockheed Martin"), we submit this objection to the proposed consent decree between the Washington Department of Ecology ("Ecology") and the City of Moses Lake ("the City") in the matter of *Washington State Department of Ecology v. City of Moses Lake*, No. 05-CV-182-FVS, before the District Court for the Eastern District of Washington.

Ecology and the City (together, "parties") have prepared a consent decree representing to the court that they have conferred with interested parties in the process leading to settlement. The consent decree singles out Lockheed Martin as a party responsible for TCE contamination at the Moses Lake Wellfield Superfund Site ("Site"). The truth is, however, that Ecology has not once met or conferred with Lockheed Martin. Had it done so and obtained all of the facts surrounding this complex matter, we are confident that Ecology would have not only omitted any reference to Lockheed Martin, but would not have agreed to the consent decree in the first place.

The basic, underlying issue facing Ecology is whether it should choose sides in a complicated and factually-intensive dispute between litigants as to who should be held responsible for contamination at the Site. Ecology has little or no knowledge of the historical facts relating to the sources of contamination, or the positions of parties in the City's lawsuit

against Lockheed Martin and others ("City's lawsuit"), which is discussed below. Ecology also has no investigative, remedial, fact finding or adjudicatory responsibilities at the Site; these duties are delegated to the EPA by Ecology, and to the judicial system by CERCLA and MTCA. We therefore believe that Ecology is simply not in a position to take sides, obtains no benefit from doing so, and therefore should not. But, for the reasons discussed below, by entering the consent decree, Ecology is taking sides, we believe improperly, in the dispute between the City, Lockheed Martin and others. We therefore urge Ecology to withdraw the consent decree for these and other reasons set forth in Part II below.

I. FACTUAL BACKGROUND OF THE SITE AND THE CITY'S RELATED COST RECOVERY ACTION

The consent decree reflects a misunderstanding of the facts pertaining to Lockheed Martin and the contamination at the Site. The factual record is well developed in the City's lawsuit. Those facts are presented here at some length so that Ecology may see why Lockheed Martin believes that Ecology should not take sides against it.

A. Procedural History of the Moses Lake Wellfield Contamination Superfund Site

In April 1988, the State of Washington's Department of Social and Health Services, now the Department of Health ("DOH"), informed the City that trichloroethylene ("TCE") had been discovered at levels slightly above the federal maximum contaminant level ("MCL") of 5 parts per billion ("ppb") in the City's Larson zone wells ML 21, 22 and 28. TCE also was discovered in Well 23, but at levels below 2 ppb, which is well below the MCL.[1] The DOH recommended that the City take Well 22 out of service and publish a notice to its water customers informing them that TCE above the MCL had been discovered in three of its wells. Although The City initially objected to both DOH recommendations, it eventually decided to take ML 22 out of service in August 1988 and publish a press release in December 1988 advising municipal water customers of the TCE contamination.

In 1989, the EPA hired a consultant, Ecology & Environment, Inc., to draft a background data report and field operations work plan. Ecology & Environment also prepared for the EPA a Site Inspection Report for Former Larson Air Force Base/Grant County Municipal Airport Moses Lake, WA, in February 1990. Following the EPA's preliminary investigations, the EPA and the United States Army Corps of Engineers ("USACE") entered into a Memorandum of Understanding pursuant to which the USACE began an environmental site assessment at Larson Air Force Base in 1991, and hired a consultant, Dames & Moore, to install monitoring wells to

---

1 The City has admitted that it continues to operate Well 23, has incurred no costs in response to TCE in Well 23, and is not concerned about the trace detections of TCE.

determine the extent of the TCE contamination. The USACE's consultant, Dames and Moore, conducted the Phase I Remedial Investigation of Larson Air Force Base. In October 1992, the EPA placed The City's Larson zone wells, the nearby privately owned Skyline Water District, and a number of privately owned residential wells on the CERCLA National Priorities List. All of these areas were collectively designated as a single Superfund Site, the "Moses Lake Wellfield Contamination Site" ("Site").

The EPA is the lead agency for the Site. As the lead agency in charge of the Site, EPA is the agency empowered "to manage the specific technical details, document reviews and regulatory decisions." In 1994, the EPA issued a draft Potentially Responsible Party ("PRP") Report that identified more than 20 PRPs. The EPA has continued its investigation at the Site, including interim investigations, multiple feasibility studies and interim actions with regard to the privately owned Skyline water system. Most recently, the EPA released a Groundwater Feasibility Study and a Soil Gas Feasibility Study in August 2006. EPA's plan to release its draft proposed plan for public comment was postponed last year when the City sought and obtained an injunction prohibiting EPA from submitting its remedial plan for public comment.

Between 1989 and 1994, the City undertook a number of well rehabilitation projects for its Larson zone water system in order to provide potable water to its water customers in accordance with DOH requirements and the federal and state Maximum Contaminant Level of 5 parts per billion for trichloroethylene. The City did not perform these projects pursuant to any enforcement orders, consent decrees, administrative orders or interagency agreements with the EPA, USACE, or Ecology. No federal or state agency objected to the City's well rehabilitation projects. The City's water system rehabilitation projects needed DOH approval in order to comply with its state water purveyor permits, but the City never sought Ecology's informal advice through a "no further action letter" approving its projects. The City is in compliance with all DOH regulations and has been authorized by the DOH to deliver water from its Larson zone wells to its customers since it completed its rehabilitation projects at all times since April 1994. Since then, the City has conducted compliance monitoring of its wells and reported its monitoring results regularly to the DOH. Monitoring since 1994 has shown there have not been any TCE detections above the MCL in any City wells for nearly seventeen years. Capacity data the City submitted to the DOH in its 1994 Water System Plan, which the DOH approved, confirms that water quantity in the Larson zone had been restored to pre-TCE levels, and the City's 2001 Water System Plan confirms that the Larson zone has the most surplus water capacity above and beyond the maximum daily demand of any of the City's water zones. The City's potable water supply projects did not attempt to treat or abate the TCE contamination in the aquifer itself or in areas other than its Larson zone wells.

In October 2004, the City's lawsuit was filed in the Eastern District of Washington seeking CERCLA cost recovery and declaratory relief or, in the alternative, contribution against three of the PRPs identified in the EPA's 1994 PRP Report, the U.S. Government, The Boeing Company ("Boeing") and Lockheed Martin. The case was assigned to Honorable Alan A.

McDonald, who has heard much of the evidence and entered a number of orders, including three orders granting summary judgment against the City with respect to certain of its claims.

B. The City's Potential Liabilities As A Result Of Its Ownership And Operation Of The Larson Wastewater Treatment Plant

The City has owned and operated the Larson Municipal Wastewater Treatment Plant since approximately 1967. Prior to the City's acquisition, and continuing today, the sewage treatment system has operated through a series of aeration and percolation lagoons with ultimate bare ground disposal. For approximately one year in 1974, one of the City's aeration ponds suffered a leak, resulting in effluent percolating to the ground prior to aeration or chemical treatment.

In its August 2005 Groundwater Feasibility Study and Shallow Soils Feasibility Study, the USACE identifies three Areas of Potential Concern ("AOPC") at the Site. Although Lockheed Martin's sole location inside Bay 4 of 8-Place Hanger (PSA 14) is not considered one of the possible primary source areas for the three AOPCs, the City's own Larson Municipal Wastewater Treatment Plant is identified as one of the three "only plausible PSAs upgradient of" the northeastern extent of AOPC2.

C. Lockheed Martin's Historic Activities At Larson Air Force Base

The draft consent decree includes a finding of fact that "Lockheed Martin's predecessor assembled and maintained intercontinental ballistic missiles at the Site." Draft Consent Decree at 6:21-22. Since Ecology has not taken any discovery in this matter, and also has not attempted to consult with Lockheed Martin regarding this alleged fact, the following facts are provided to correct this erroneous statement and present the true nature of Lockheed Martin's brief activities at Larson Air Force Base from approximately mid-1960 to August 1962.

The City and Lockheed Martin have extensively briefed the issue of Lockheed Martin's alleged CERCLA and MTCA liabilities as an operator and an arranger in response to the City's Motion for Summary Judgment. After a three-month briefing process and an extensive review of hundreds of exhibits, Judge McDonald denied the City's motion on the grounds that substantial evidence suggests that Lockheed Martin was neither an operator nor an arranger. Since that motion was decided, additional witness depositions and forensic discovery at Larson Air Force Base have further confirmed that Lockheed Martin was not an operator of any TCE source there, and that the only location where Lockheed Martin installed equipment for the U.S. Air Force's operations – a portion of the Eight Place Hangar at Larson Air Force Base – is not a source of the TCE contamination. For ease of reference, the facts and evidence described below are identified by their docket number in the City's lawsuit, Case No. 04-0376-AAM. Judge McDonald's Order Granting Defendant Lockheed's Motion for Summary Judgment, *Inter Alia*, which also denied

the City's Motion for Summary Judgment on the Issue of CERCLA and MTCA liability, is located at Docket No. 354 (filed Oct. 17, 2006).

In the Order, Judge McDonald found that the evidence "raises a genuine issue of material fact whether [Lockheed Martin] managed, directed or conducted operations at the MAMS facility having to do with the leakage or disposal of hazardous waste" (Order Granting Defendant Lockheed's Motion for Summary Judgment, *Inter Alia,* ("Order") (Docket No. 354) at 41 (Filed Oct. 17, 2006)) and that "Lockheed has also presented evidence raising a genuine issue of material fact whether it was responsible for specifications that governed operation of missile maintenance facilities, including MAMS, as opposed to the USAF, and even then whether any specifications for which it may have been responsible were specifically applicable to LOX cleaning with TCE, and handling, storage, and disposal of the same from the MAMS facility." *Id.* Moreover, as seen below, soil vapor testing has shown that the location of the former MAMS facility is not even a source of the contamination at the Site.

1. Lockheed Martin Did Not Use, Handle, Store Or Dispose of TCE at Larson Air Force Base

As demonstrated below, there is overwhelming evidence that Lockheed Martin never handled, used, or disposed of TCE; nor did it direct others to do so. *See* Opposition (Docket No. 266) at 6-19; Statement of Disputed Material Facts ("SDMF") (Docket No. 267) ¶¶ 1, 4, 6, 7, 10, 12, 27, 30, 32-36, 38, 39, 41, 43, 45, 57, 58, 60, 63, 72, 74, 97, 99-103, 147. Although it installed cleaning equipment at MAMS designed to be used during the operational phase that began after Lockheed Martin left Larson Air Force Base, it did not use the equipment, did not place TCE in the equipment, and otherwise had nothing to do with TCE. SDMF ¶ 12.

a. Lockheed Martin Did Not Use Or Dispose of TCE At LAFB

The City contends that the source of TCE contamination at issue is Larson Air Force Base ("LAFB") near Moses Lake, Washington, which was first opened in 1942 and has continued as a civilian airport since it was closed in 1965. SDMF ¶¶ 1, 12. During the ensuing 64 years, Lockheed Martin was present at LAFB for only about two years, leaving LAFB in September 1962. SDMF ¶ 12. During that brief period, the bulk of Lockheed Martin's work was performed at three remote locations—three missile silo complexes, each of which was located more than 25 miles from LAFB. SDMF ¶ 12. The remote missile complexes have not been identified as a source of the alleged contamination. SDMF ¶ 11. Known as "T-4," LAFB was one of five sites operated as headquarters for Titan I missile silos. The others, known as T-1, T-2, T-3 and T-5, were located in other states. Statement of Material Facts ("SMF") (Docket No. 243) ¶ 14.

The Titan I was fueled by combining liquid oxygen ("LOX") with RP-1 jet fuel upon ignition. Liquid oxygen is highly explosive when it comes into contact with hydrocarbons.

Therefore, pipes and other equipment that would come into contact with LOX had to be "LOX cleaned" to remove all traces of hydrocarbons before being installed. Since TCE was used as one step in the LOX cleaning process, LOX cleaning has been the focus of City's allegations against Lockheed Martin. But Lockheed Martin did not do any LOX cleaning at LAFB.

There were three phases of the Titan I program at LAFB. The first phase involved the brick-and-mortar construction of the three remote missile complexes and support facilities at LAFB. This construction phase was conducted by the USACE and its prime contractor, McDonald-Scott & Associates. It began in approximately 1959 and was completed in mid-1962. The second phase was the "activation," during which the associated contractors, including Martin, "install[ed] and test[ed] ground support equipment and operation equipment for the missiles" at the remote missile complexes and in the Combined Guided Missile Assembly Building ("MAMS"). The MAMS was located in part of an existing hangar at LAFB known as the "8-Place Hangar" and was set up to become the U.S. Air Force's ("USAF") operational headquarters for the Titan I at T-4. During the third phase – the "operational" phase – the USAF's Strategic Air Command ("SAC") operated the missiles and all support facilities prior to LAFB's closure in 1965. Lockheed Martin was the activation manager and one of the activation contractors during the second phase, but it had no active role in the first and third phases.

There was a considerable amount of LOX cleaning during the construction phase, as LOX-clean pipes had to be installed at the silos and in a LOX generating facility ("LOX Plant") that was constructed by contractors for the USACE at LAFB. Through the prime construction contractor, McDonald–Scott, USACE contracted with Dow Chemical Co. ("Dow") and Compudyne Corporation ("Compudyne") to do the LOX cleaning. Most such LOX cleaning was done at a facility operated by Dow near Warden, Washington, more than 25 miles from LAFB. There was also a potential need for LOX cleaning during the operational phase, and USAF personnel were trained for that purpose. But there was little need for LOX cleaning during the activation phase because parts to be installed at the remote missile complexes and MAMS – including the missiles themselves – were LOX cleaned and bagged at the factory. What little LOX cleaning was needed during the activation phase was primarily performed by Dow at its Warden facility. SDMF ¶ ¶ 12, 70.

Depositions and affidavits of nine former Lockheed Martin employees who worked on the Titan I activation at T-4 have been taken in this case. Of those witnesses, four were assigned to work directly at the MAMS, and none of those four saw TCE being used, stored or disposed of by Lockheed Martin or its subcontractor at LAFB.[2] SDMF ¶ 12.

---

[2] Witnesses also testified that they did not see TCE being used, stored or disposed of by Lockheed Martin or its subcontractor at the remote missile complexes. SDMF ¶ 12. Even if they had, such use would be irrelevant since each of these complexes was at least 25 miles

[Footnote continued on next page]

Lester Lippy, whose office was at MAMS, was the site activation manager for Lockheed Martin beginning in early 1962.[3] Mr. Lippy testified that Lockheed Martin did no cleaning at LAFB. Jones Decl. (Docket No. 244-1, Exh. 42) Lippy Dep. 278:21-279:8. In general, LOX cleaning was not necessary during the activation phase at T-4 because all equipment arrived "[s]ealed, shipped by truck. . . . [E]verything came in very thick plastic, including the missile. And if it was tampered with, back to the factory it went." Schlosser Decl. (Docket No. 271, Exh. L) Lippy Dep. 46:5-16. Mr. Lippy's predecessor, Dr. Lloyd "Smokey" Stover, who also had his office at MAMS, gave similar testimony:

> Q: Okay. Did Martin have any major cleaning operations at the base?
> A: Negative, no.
> Q: Did it operate any degreasers at the base?
> A: No.
> Q: Was there any underground storage tanks that were operated or used by Martin?
> A: Not to my knowledge. I could see no reason why they would.

Schlosser Decl. (Docket No. 271, Exh. H) Stover Dep. 32:5-24.

Lockheed Martin's receiving area at LAFB received hard parts, not chemicals. Garland Ransom, a former employee of Federal Electric, a Lockheed Martin subcontractor, worked in the receiving area at MAMS. Mr. Ransom testified that parts arrived at the MAMS "in a manner that was already LOX cleaned . . . in plastic bags." Schlosser Decl. (Docket No. 271, Exh. S) Ransom Dep. 70:2-10. When bagged parts were compromised, they were either returned to the factory or sent to the Dow facility at Warden for cleaning. *Id.* 47:15-48:3; 50:18-21. On the few occasions when a faster turnaround was needed for LOX cleaning, they were given to the USAF for cleaning at an unknown location. *Id.* 61:12-62:15. Mr. Ransom never saw TCE used or disposed of by Lockheed Martin or Federal Electric:

> Q: Did you ever receive solvents at MAMS?
> A: No.
> Q: Did anybody working for Federal Electric to your knowledge receive solvents at MAMS?

[Footnote continued from previous page]

away from LAFB, and none are considered a potential source of the TCE contamination at LAFB. SDMF ¶ 11.

[3] Mr. Lippy went on to have a distinguished career as manager of the Viking Mars lander, the Venus rocket probe, and as a member of the special panel convened by NASA to investigate the Challenger Space Shuttle disaster, among other things.

A: Not to my knowledge.
* * *
Q: Did you ever use solvents at any time while you were working for Federal Electric or Martin Marietta?
A: I did not.
Q: Did you ever see anybody using solvents while you were working for Federal Electric or Martin Marietta?
A. No.
* * *
Q: Did Federal Electric do any LOX cleaning of any kind to your knowledge?
A: No, they did not.
Q: Did Martin Marietta do any LOX cleaning to your knowledge?
A: Not to my knowledge.

Id. 72:19-73:-22.

There was a "clean room" (called the "hydro-pneumatic propulsion shop") containing cleaning equipment at MAMS, but Lockheed Martin personnel testified that it was not used by Lockheed Martin for cleaning. Drawings of the MAMS facility reveal that while cleaning equipment was installed in the clean room at MAMS by Lockheed Martin, Lockheed Martin had no responsibility for introducing TCE into the equipment. This is known because TCE and other solvents were not identified on the equipment list, and they would have been on that list had Lockheed Martin had any responsibility for operating the equipment or making it operational. Witnesses who worked at MAMS testified that the clean room was locked and that Lockheed Martin personnel did not go in there. SDMF ¶ 12. Karl Easterly, who supervised all Lockheed Martin quality control personnel, testified in a sworn declaration that Lockheed Martin's quality control personnel never entered the clean room at MAMS. Schlosser Decl. (Docket No. 271, Exh. T) Easterly Decl., ¶ 10. This is significant because the presence of quality control personnel was required when LOX cleaning was done by Dow at its Warden plant. *Id.* ¶ 15. Finally, all of this testimony is corroborated by a contemporaneous document -- a Memorandum of Understanding signed by Lockheed Martin and the government showing that by March 19, 1962, the clean room was staffed by USAF personnel. Schlosser Decl. (Docket No. 271, Exh. E).

The only witness who says he saw Lockheed Martin using any TCE at all is Donald Krebs, who claims he witnessed limited LOX cleaning in the MAMS clean room using small bowls on fewer than a dozen occasions. Mr. Krebs' testimony, however, is contradicted by all other witnesses, who testified that Lockheed Martin did no LOX cleaning at LAFB, and by the contemporaneous documentary evidence. As Judge McDonald explained, "evidence, including testimony from other witnesses, . . . legitimately calls Krebs' credibility into question." Order (Docket No. 354) at 42:10-11.

b. Lockheed Martin Did Not Design, Build, Operate Or Maintain The LOX Plant

There has been only one location EPA has identified with a significant detection of TCE at LAFB – the sludge contained inside a concrete sump beneath the Liquid Oxygen ("LOX) Generating Plant. SDMF ¶ 161. From the beginning of its cost recovery action, the City has tried to link Lockheed Martin to this contamination by alleging that Lockheed Martin was responsible for building a "Liquid Oxygen Generating Plant ("LOX Plant") . . . to support the Missile Facility and its operations at LAFB" and that "as integrating contractor, [Martin] had direct oversight responsibility for operations at the LOX Plant and other support facilities at LAFB." Schlosser Decl. (Docket No. 271, Exh. U) at 3:21-23; First Amended Complaint (Docket No. 182) at ¶ 5.55; City MSJ (Docket No. 242) at 16:14-15 ("Lockheed [Martin] managed the day-to-day affairs of the MAMS facility ***and other Titan support facilities at LAFB***.") (emphasis added). But the evidence is overwhelming and undisputed that Lockheed Martin had no responsibility for the LOX Plant.

The LOX Plant was "designed for the USAF by Tuttle Engineering Co. of Arcadia, California." The USACE contracted with a local builder, H. Halvorsen, Inc. of Spokane, Washington, to build the LOX Plant and its associated utilities, water, sewer and industrial waste systems. H. Halvorsen began construction in October 1960. A separate contractor, Herrick L. Johnston Co., fabricated the LOX and liquid nitrogen storage vessels and purge tank at its factory in Columbus, Ohio. The LOX-liquid nitrogen transfer piping was fabricated by Industrial Contractors at their Idaho Falls, Idaho, factory, cleaned at Dow's Warden facility, and installed by Industrial Contractors at the LOX Plant. The USAF's contractor, Air Products Company, installed the LOX Plant equipment it had fabricated. The USAF had accepted the entire LOX Plant by May 1961. All of these facts are confirmed by contemporaneous documents. SDMF ¶ 12.

The USAF trained its own personnel, who operated and maintained the LOX Plant. SDMF ¶ 12. Pursuant to its contracts with Lockheed Martin, the USAF was responsible for providing all propellants and gases needed for the activation of the missiles. SDMF ¶ 12. The LOX Plant "was strictly an USAF operation. They brought the equipment in, set it up, had a local contractor, I guess, build it. . . . And it was strictly . . . operated by the Air Force. There was no civilians involved in it or anything." Schlosser Decl. (Docket No. 271, Exh. R) Friday Dep. 84:15-22. Mr. Friday personally observed that it was "men in uniform who operated" the LOX Plant. *Id.* at 85:3-4.

Lockheed Martin likewise did not train or supervise any operations at the LOX Plant. The only civilians associated with the LOX Plant worked for the USAF's contractor, Air Products. Former USAF servicemen who worked at the LOX Plant uniformly testify that they had no contact whatsoever with Lockheed Martin during their training or operations. *See* Depositions of Rudy Dolotina and Rick Lappen.

c. Lockheed Martin Did Not Operate Or Maintain TCE Equipment At 8-Place Hangar

From the beginning of its cost recovery lawsuit, the City has alleged that Lockheed Martin "used a 550-gallon underground TCE catch tank." First Amended Complaint (Docket No. 182) at ¶ 5.56. The as-built drawings and equipment lists applicable to Lockheed Martin's work, however, do not show any storage tank, and former Lockheed Martin employees denied any knowledge of TCE storage tanks during their depositions. SDMF ¶ 58. For example, Mr. Friday testified:

> Q: During the time that you were at Martin-Marietta, did you have any knowledge of an underground storage tank associated with trichloroethylene at Larson Air Force Base?
> A: No. I don't think it ever was handled that way.

Schlosser Decl. (Docket No. 271, Exh. R) Friday Dep. 86:19-23. Similarly, Mr. Lippy testified:

> Q: Did you ever become aware of an underground storage tank for TCE that was used by Martin Marietta?
> A: No.
> * * *
> Q: Did you ever hear of an underground storage tank being used at the air bases associated with any of the Titan missile sites that were being activated?
>
> A: No.

Schlosser Decl. (Docket No. 271, Exh. L) Lippy Dep. 92:1-24. Mr. Lippy also testified that he never saw an above ground tank, either. Jones Decl. (Docket No. 244-1, Exh. 42) at 290:8-291:15. Other witnesses confirm this. Schlosser Decl. (Docket No. 271, Exh. H) Stover Dep. 32:19-24; Schlosser Decl. (Docket No. 271, Exh. N) Horak Dep. 56:1-18; Schlosser Decl. (Docket No. 271, Exh. S) Ransom Dep. 72:19-75:3; Schlosser Decl. (Docket No. 271, Exh. T) Easterly Decl., ¶ 5. Once again, the evidence overwhelmingly contradicts another of the City's theories that Lockheed Martin used and disposed of TCE.

The USACE reports that purport to describe the historical activities at 8-Place Hangar, where the MAMS facility was located, all are derived from the USEPA's 1994 PRP Report authored by Mr. Athmann. Defining "USEPA, 1994" as the 1994 PRP Report, the Shallow Soils Remedial Action Objectives report explains that its "site histories and information related to chemical use, disposal or release . . . are derived from various sources including USEPA's *PRP Information for the Moses Lake Wellfield Contamination Superfund Site* (USEPA, 1994)..." Third Jones Decl. (Docket No. 351, Exh. 2) at COE119669. After identifying the 1994 PRP

Report as the source of the historical statement upon which the City relies, the USACE ***disclaims the accuracy*** of those statements:

> Some of this information is anecdotal and, in many cases, USEPA interviews with former employees were conducted years after Larson AFB ceased operations. Consequently, ***site histories and potential chemical use and release information included in documents such as USEPA (1994) may not be accurate.***

Third Jones Decl. (Docket No. 331, Exh. 2) at COE119651 (emphasis added); *see also id.* at COE119669.

There can be no question that the allegations against Lockheed Martin contained in the 1994 PRP Report are inaccurate. Mr. Athmann acknowledged that those historical statements were not supported by statements made by former Lockheed Martin employees during interviews that he had purposely excluded from his report because these witnesses "had no information to provide about TCE." *See* Opposition (Docket No. 266) at 14:1-19; SDMF ¶ 1 and the evidentiary objections thereto. As explained in Lockheed Martin's Opposition to the City's Motion for Summary Judgment, Mr. Athmann never had evidence that TCE was used by Lockheed Martin at LAFB; he relied instead upon a purported "unidentified source of information" that was nothing more than water-cooler banter. Schlosser Decl. (Docket No. 271, Exh. A) Athmann Dep. 235:17-24; 235:25-236:3; 236:11-14; 233:8; 233:19-23; 234:1-8. Thus, Mr. Athmann's 1994 PRP Report itself contains multiple layers of inadmissible hearsay, and the USACE shallow soils reports, which expressly rely on Mr. Athmann's summaries of these unsubstantiated rumors, add yet more layers of hearsay, and the USACE rightly disavows the accuracy of these reports.

2. USACE Investigations And Soil Gas Sampling Confirms That The MAMS Facility Inside Bay 4 Of The 8-Place Hangar Is Not An Historic Source Of TCE Contamination

There also is no forensic evidence that 8-Place Hangar is even a source of the TCE contamination despite repeated attempts by the USACE and the City to confirm the 8-Place Hangar as a source.

In 2000, the USACE conducted an Expedited Investigation at the 8-Place Hangar that searched for an alleged underground storage tank farm that the USACE believed was associated with the MAMS facility, but did not find the tanks and did not find any VOCs in the vicinity, either. According to the June 2000 Technical Memorandum discussing the results of this investigation, although "[n]o record of removal or of closure activities has been located for these tanks," ground penetrating radar "***did not identify any USTs***" in the area of the suspected Industrial UST farm. Supp. Schlosser Decl. (Docket No. 336, Exh. TT) at 5 & 10 (emphasis added). Instead, the radar found nothing more than pipes and a "suspected" valve box, but the

"***pipes were empty and did not contain any detectable concentrations of VOCs*** based on measurements made using a PID field instrument." Supp. Schlosser Decl. (Docket No. 336, Exh. TT) at p. 10 (emphasis added). Soil samples also were collected from an east-west trench excavation along the southern edge of the 8-Place Hangar Bay No. 4, referred to as samples 13a-13d. "These samples were collected near [alleged] chloroethane and trichloroethene catch tank holding pads in the vicinity of the suspected location of the former industrial USTs." *Id.* All four of the Industrial UST soil samples tested ***non-detect*** for VOCs, including TCE. Supp. Schlosser Decl. (Docket No. 336, Exh. TT) at Table 5.3. Thus, the USACE's reference to "[c]onfirmation soil samples" in its Shallow Soils Feasibility Study Third Jones Decl. (Docket No. 331, Exh. 2), is misleading because the soil samples "confirmed" that there was no TCE there.

In October, the City conducted additional soil gas sampling inside Bay 4 of the 8-Place Hangar in the suspected location of the MAMS facility. Lockheed Martin's consultants also took samples at the same time and locations, which samples were all non-detect TCE. *See* Declaration of Robert Morrison, attached to Lockheed Martin's Reply to City's Opposition in support of Lockheed Martin's Motion for Clarification or, in the Alternative, Motion for Summary Judgment (available in the docket by November 13, 2006).

Similarly, an August 2005 Shallow Soils Feasibility Study prepared on behalf of the USACE reported that although the USACE has identified three Areas of Potential Concern ("AOPC"), Lockheed Martin's sole location inside Bay 4 of 8-Place Hanger (PSA 14) is not considered one of the possible primary source areas for any of the three AOPCs. Third Jones Decl. (Docket No. 351, Exh. 2) at COE119683 (identifying the possible historic source areas for the three AOPCs).

II. ECOLOGY HAS IMPROPERLY TAKEN SIDES IN THE DISPUTE OVER WHO IS RESPONSIBLE FOR CONTAMINATION AT THE SITE WITHOUT SUFFICIENT KNOWLEDGE OF THE FACTS

On October 16, 2006, Judge McDonald entered an order granting summary judgment in favor of Lockheed Martin based on the applicable statutes of limitations. In follow-up proceedings, the City has cited the proposed consent decree in support of its argument that its claim against Lockheed Martin remains actionable. Regardless of the merit (or lack thereof) of the City's claim regarding the consent decree, there is no reason why Ecology should choose to provide that procedural weapon for the City to use against Lockheed Martin since Ecology is getting nothing in return from the City and does not know enough facts to choose sides in the dispute.

A. Ecology has Chosen Sides in the City's Cost Recovery Action

The circumstances surrounding Ecology's lawsuit make clear that it is a product of a decision to assist the City in its cost recovery action against Lockheed Martin, Boeing, and the U.S. Government. These circumstances include (i) Ecology's limited involvement at the Site, (ii) the timing and nature of its lawsuit, (iii) the lawsuit's procedural history, (iv) Ecology's own statements in its response to Boeing's June 2006 letter, and (v) the contents and scope of the consent decree.

Ecology's involvement at the Site is limited. Prior to 1994, Ecology had little or no involvement at the Site, as described in Part I above. Since 1994, Ecology has adhered to its role set forth in the Superfund Management Agreement between Ecology and EPA. Under that agreement, EPA assumed the lead agency role overseeing investigation and remediation at the Site. Ecology, for its part, assumed the role of support agency, which consisted of attending three milestone briefings by EPA. Not surprisingly, Ecology's total past response costs have amounted to only $3,316.82. EPA is currently in the process of finalizing the proposed Remedial Action / Feasibility Study and moving forward with the investigation and remediation at the Site.

Nevertheless, Ecology filed a cost recovery action for past response costs and future response actions/costs in June 2005. Ecology's action is a Section 107 claim and the City is the only defendant.

Ecology's lawsuit has had no adversarial process, i.e., no answer, discovery, factual or legal disputes, or default judgments filed or briefed in the matter. The City has not raised any affirmative defenses, such as a potential statute of limitations defense to bar Ecology's past response costs. Moreover, according to Ecology, it has "collaborated on the pleadings and the settlement" with the City. *See* Ecology's September 13, 2006 Response Letter to Boeing's Counsel, Perkins Coie.

In fact, Ecology itself has characterized the lawsuit as an effort to assist the City's pursuit its own cost recovery action. In a June 2006 letter to Ecology, Boeing's counsel asserted that Ecology's lawsuit and anticipated settlement with the City were improper. Boeing's June 21, 2006, Letter. In its response, Ecology denied its action was any more "'collusive' than any other settlement under MTCA and/or CERCLA." Ecology's Response Letter at 1. Ecology confirmed, however, that the purpose of the lawsuit was "to settle [the City's] MTCA and CERCLA liability as to Ecology by requiring [the City] to pay Ecology's past and future costs ***and to address the public policy reasons discussed above***." *Id.* (Emphasis added). According to Ecology, the public policy reasons are to bring a Section 107 claim against the City in an attempt to preserve the City's claim in its own cost recovery action against the U.S. Government, Boeing, and Lockheed Martin:

> [T]here are strong public policy reasons supporting this lawsuit and settlement. As you note in your June 21 letter, the Supreme Court's *Aviall* decision changed the contribution landscape for CERCLA sites. At current or former federal facilities, *Aviall* arguably leaves private PRPs without any recourse against the federal government when EPA does not take CERCLA § 106 action against another federal agency. This is currently the situation at the Moses Lake site. The State of Washington has a duty to protect human health and the environment for all of the state's citizens, including ensuring that the federal government adequately addresses the contamination it has caused in our state.

Id. at 2. Since Ecology's response to Boeing's letter, however, the public policy purpose of Ecology's lawsuit has been further highlighted by Ecology's actions. Ecology has dropped its claim for future oversight costs, and has submitted a stipulated request to dismiss its MTCA claim against the City. As a result, Ecology's lawsuit has been stripped to a CERCLA Section 107(a) action for $3,316.82 -- Ecology's past response costs.

Ecology and the City have also represented to the court in two joint status conferences that they have negotiated and consulted with "other interested parties." October 3, 2006, Joint Status Report (Case No. 05-CV-00182-FVS, Docket No. 19) at 2. Yet not once was Lockheed Martin consulted, even though the consent decree inaccurately sets forth alleged facts relating to Lockheed Martin's historical role at the Site and its responsibility for TCE contamination. Further, the only other PRPs referenced in the consent decree – of more than 20 identified by EPA – happen to be the two other defendants in the City's lawsuit.

In short, Ecology has chosen a side in the City's litigation against Lockheed Martin, Boeing, and the U.S. Government. And Ecology's lawsuit and related consent decree are its attempt to provide assistance to that side in its lawsuit to recover costs from Lockheed Martin and the other two defendants.

B. Ecology Should Not Be Taking Sides in This Matter

Ecology's desire to implement the State of Washington's "duty to protect human health and the environment for all of the state's citizens" by "ensuring that the federal government adequately addresses the contamination it has caused in [the] state" is an understandable and reasonable interest. Lockheed Martin also understands that, in most instances, it is sound policy that Ecology would assist a private PRP who is in turn investigating and remediating contamination by taking measures within its authority to ensure the cooperating PRP can pursue contribution from other responsible parties.

However, that is not the case here, and we believe Ecology and Washington's public policy is best served if Ecology does not take sides in the City's lawsuit. There are four reasons why we believe so: (1) Ecology does not know all of the facts to allocate responsibility and is not

in the best position to obtain these facts; (2) the City is improperly using the consent decree to obtain an unfair procedural advantage against Lockheed Martin; and (3) Ecology should not provide a benefit where no benefit is gained.

1. Ecology Lacks Sufficient Information And Is Not In The Best Position To Choose Sides

Where Ecology is a lead agency at a site, it is charged with and in a position of investigating and gathering all of the facts regarding the extent of the contamination, constituents of concern, sources of the contamination, historical activities of PRPs connected to the source points, and in some cases the relative apportionment of responsibility between PRPs. Here, as discussed above, Ecology is not the lead agency at the Site, nor has it been involved in the investigation of the plume or its potential sources and PRPs. Ecology also is not a party to the City's lawsuit and the discovery therein that is currently underway. Simply put, Ecology does not know – and is not in a position to know – all of developing facts as to who is responsible for TCE contamination at the Site.

The parties that are most knowledgeable of the facts, and therefore in the best position to make a fairness determination of who should be responsible, are the lead agency (EPA) and the court overseeing the City's cost recovery action (Judge McDonald). As described above, EPA has extensive knowledge of the Site and the PRPs and their potential responsibilities, and so does Judge McDonald. Ecology should defer to these decisionmakers and not enter the consent decree.

EPA has conducted and continues to conduct investigations into the extent of the plume, the sources of contamination, and the relative liability of the PRPs. EPA and the City have been working closely together on the draft proposed plan for a feasibility study and remedial investigation. That plan will set forth who EPA believes is responsible and who it thinks should assist in the investigation and remediation of the Site. In short, Ecology should let EPA as the lead agency direct and oversee the investigation and remediation of the Site, which it is currently doing. Ecology is not sufficiently informed and involved to reasonably and fairly do the same.

With respect to the allocation of response costs among PRPs, we believe that Judge McDonald, not Ecology, is the appropriate person to determine who is responsible for the costs and allocate such costs equitably. Judge McDonald has had the benefit of overseeing two years of active discovery by the parties. Much of the discovery has been presented to the court in motions for summary judgment, a motion for preliminary injunction, a motion to dismiss, and several motions to compel discovery. The court is in a position to obtain and review all of the facts relating liability and allocation through an adversarial process.

EPA found that the City's Municipal Waste Water Treatment Plant was a likely source of TCE contamination. There is no mention of the Plant in the consent decree. Judge McDonald

found that there is substantial evidence that disputes the City's claim that Lockheed Martin is responsible for contamination. Yet the consent decree singles out Lockheed Martin as a responsible party and incorrectly states purported "facts" contrary to the court's findings. The City's past response costs were barred by the statute of limitations because the court found that it waited too long to bring its claim. Yet the City is now arguing that Ecology's consent decree requires Lockheed Martin to remain in a case in which the City has no damages against Lockheed Martin. Without all of the facts and access to such facts, Ecology cannot fairly determine who should be responsible, and should leave it to the EPA and the court to resolve.

2. The City Is Improperly Using the Consent Decree to Obtain an Unfair Procedural Advantage Against Lockheed Martin

While Ecology has strong public policy reasons for assisting private PRPs in pursuing the federal government, the City has subverted Ecology's good intentions to unfairly use its consent decree at the expense of another private PRP, Lockheed Martin. As mentioned above, Judge McDonald held that the City's action for past response costs against Lockheed Martin was barred by the applicable statute of limitations under CERCLA and MTCA, since the City had waited over 10 years before filing its claims and failed to get a tolling agreement. Since the City has no remaining damages to claim against Lockheed Martin, Lockheed Martin should naturally be dismissed from the case. However, the City is now attempting argue that Ecology's consent decree provides it with a basis for keeping its claims against Lockheed Martin alive. Evidently, the City believes that it can hold Lockheed Martin in the case and hostage to spiraling litigation expenses – despite having all of the City's past response costs dismissed as time barred – based upon a technical argument predicated on a nominal payment of Ecology's $3,316.82.

The City's actions undermine Ecology's reason for entering the consent decree – to provide a private PRP the ability to sue a federal PRP – by using it to unfairly hold another private PRP in its lawsuit. The City also has abused the settlement process by using it to have Ecology and the court establish findings of fact as to Lockheed Martin's activities and liability at the Site that are inaccurate and false. Lockheed Martin has been a good corporate citizen in Washington and elsewhere, stepping up to pay substantial remediation costs where it has some responsibility for environmental contamination. And it respects the efforts of Ecology, EPA, and other similar agencies to clean up our environment. But after diligent investigation, Lockheed Martin is confident that it has no responsibility for the contamination at the Site. The draft consent decree discriminates unfairly against Lockheed Martin, and is no more than a litigation tactic being used by the City to improperly keep Lockheed Martin in a lawsuit where it does not belong.

3. Ecology Gains No Benefit From Siding With the City

Ecology gains nothing by assisting the City in its lawsuit against Lockheed Martin and others. This is not a typical agency/PRP settlement under CERCLA. An agency takes steps to

assist a PRP in its efforts to recoup costs from other PRPs typically where the agency is receiving something in return that it needs, such as the PRP's cooperation in conducting the investigation and remediation at the Site, or reimbursement of major oversight costs. This is not the case here. There is no investigation or remediation required of the City, and the City almost certainly will not bring an action against other PRPs for reimbursement of their allocated shares of $3,316.82

We recognize that Ecology believes it is conveying a benefit on the City, and that the City likewise believes Ecology's consent decree is beneficial to the City and its lawsuit. However, what is clear is that Ecology receives no benefit from entering into the consent decree. If Ecology truly believes that a $3,316.82 payment is a bona fide benefit to the agency, then Lockheed Martin will pay this amount to Ecology with no admission of liability and no request for anything in return. The real benefit to Lockheed Martin would be to prevent the City from unfairly using the consent decree against Lockheed Martin.

Thank you for your consideration of our comments.

Sincerely, C.C

Robert Loewen

Robert W. Loewen

Enclosure(s)

cc: Michael L. Dunning
WA Department of Ecology
Office of the Attorney General

100108070_2.DOC