FILED ✓ ENTERED
LODGED RECEIVED

MAY 28 1997

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

C97-5337 RJB

UNITED STATES OF AMERICA, ON BEHALF OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AND THE UNITED STATES DEPARTMENT OF THE INTERIOR; STATE OF WASHINGTON THROUGH THE WASHINGTON DEPARTMENT OF ECOLOGY; PUYALLUP TRIBE OF INDIANS; AND MUCKLESHOOT INDIAN TRIBE, Plaintiffs, v. STATE OF WASHINGTON THROUGH THE WASHINGTON DEPARTMENT OF NATURAL RESOURCES, Defendant.	CIVIL NO. CONSENT DECREE

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

TABLE OF CONTENTS

		PAGE
I.	INTRODUCTION	1
II.	RECITALS	1
III.	JURISDICTION AND VENUE	9
IV.	APPLICABILITY OF CONSENT DECREE	10
V.	DEFINITIONS	10
VI.	RESERVED PARCELS	13
VII.	ACCESS	16
VIII.	IN-KIND SERVICES	17
IX.	NATURAL RESOURCE IMPACTS CONSULTATION	19
X.	COVENANTS NOT TO SUE	19
XI.	RESERVATION OF RIGHTS	20
XII.	EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION	23
XIII.	RETENTION OF JURISDICTION/DISPUTE RESOLUTION	25
XIV.	NOTICES AND SUBMISSIONS	26
XV.	GENERAL PROVISIONS	28
XVI.	MODIFICATION	29
XVII.	LODGING AND OPPORTUNITY FOR PUBLIC COMMENT	30
XVIII.	EFFECTIVE DATE	30
XIX.	SIGNATORIES/SERVICE	30

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

I. INTRODUCTION

The United States of America ("United States"), on behalf of the National Oceanic and Atmospheric Administration and the United States Department of the Interior, the State of Washington through the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe, (collectively "Plaintiffs") have filed a complaint in this matter against the State of Washington through the Washington Department of Natural Resources ("WDNR") pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended ("CERCLA"), 42 U.S.C. § 9607 and the Model Toxics Control Act ("MTCA"), RCW Ch. 70.105D. This Consent Decree addresses claims of the Natural Resource Trustees (as defined below in paragraph 3) for Natural Resource Damages (as defined in paragraph 3) against WDNR arising from the State's ownership and WDNR's management of state-owned aquatic lands in the Commencement Bay Environment (as defined in paragraph 3).

II. RECITALS

A. The United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration, the United States Department of the Interior, the Washington Department of Ecology, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe have been designated pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), and 40 C.F.R. Part 300, subpart G, to serve as trustees for natural resources for the assessment and

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

recovery of damages for injury to, destruction of, or loss of natural resources under their trusteeship.

B. The State of Washington owns certain areas of aquatic lands in the Commencement Bay Environment. WDNR, an administrative agency of the State of Washington, is charged by state law with primary responsibility for leasing, managing and otherwise exercising the State of Washington's proprietary interest in State-owned aquatic lands in the Commencement Bay Environment.

C. State-owned aquatic lands in the Commencement Bay Environment have become contaminated by releases over time of various hazardous substances (as defined in Section 101 of CERCLA, 42 U.S.C. § 9601).

D. The Plaintiffs have filed a complaint pursuant to CERCLA Section 107, 42 U.S.C. § 9607, seeking recovery from WDNR of damages for injuries to natural resources resulting from releases of hazardous substances into the Commencement Bay Environment. The Plaintiffs allege that the hazardous substances released by third parties into the environment in and around the Commencement Bay Environment have come to be deposited in, under and upon the aquatic lands of the Commencement Bay Environment and that the aquatic lands of the Commencement Bay Environment have subsequently re-released and continue to re-release those hazardous substances to the environment.

E. The Plaintiffs allege that hazardous substances

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

released to the environment from State-owned aquatic lands have injured and continue to injure natural resources under their trusteeship, and that the public has suffered economic losses as a consequence of those injuries.

F. The Plaintiffs allege that WDNR, acting on behalf of the State as owner of aquatic lands in the Commencement Bay Environment, is liable, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, RCW 70.105D.040, and other laws, for the injuries to natural resources resulting from releases of hazardous substances from the aquatic lands and is liable for damages arising from those injuries.

G. The Plaintiffs further allege that substantial quantities of the hazardous substances contaminating State-owned aquatic lands in the Commencement Bay Environment were initially released to the environment by parties who are lessees of state-owned aquatic lands or otherwise in contractual relationships with WDNR. The Plaintiffs maintain that such contractual relationships preclude WDNR from being able to take advantage of third-party defenses under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b), and RCW 70.105D.040(3)(a)(iii).

H. WDNR alleges that it is not an "owner" of aquatic lands as that term is defined in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and RCW 70.105D.010(7), and is therefore exempt from liability because the aquatic lands within the Commencement Bay Environment were acquired by the State of Washington in its

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

capacity as sovereign and because WDNR, acting on behalf of the State of Washington, has neither caused nor contributed to injuries to natural resources within the Commencement Bay Environment.

I. WDNR alleges that hazardous substance releases into the Commencement Bay Environment were caused solely by third parties who were not in a contractual relationship with WDNR and that WDNR is therefore not liable for those releases.

J. Without admission or adjudication of any fact or issue of law, in settlement of this action WDNR has agreed to make certain parcels of aquatic lands in the Commencement Bay Environment available for habitat restoration, has agreed to provide in-kind services for habitat restoration and enhancement associated with those parcels, and has agreed to consult with the Natural Resource Trustees on its management practices that could affect the natural resources of the Commencement Bay Environment.

K. Without serving as consideration in this settlement, WDNR has supported the settlement of the Natural Resource Trustees' claims for Natural Resource Damages in the Commencement Bay Environment in U.S., et al. v. Port of Tacoma, Civil No. 93-5462 (W.D. Wash.) and U.S., et al. v. Simpson Tacoma Kraft Co., et al., Civil No. 91-5260(T)C (W.D. Wash.) by making state-owned aquatic lands available for restoration sites. WDNR is currently working with the City of Tacoma to make similar arrangements with the Natural Resource Trustees for the use of state-owned aquatic

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

lands as restoration sites in support of the planned settlement of claims against the City for Natural Resource Damages in the Commencement Bay Environment.

L. In addition to its aquatic lands management responsibilities, WDNR is also responsible under state law for managing certain upland areas and for administering state regulations on the harvest of timber in areas that could affect the marine resources of the Commencement Bay Environment and those species dependent upon them. WDNR and the Natural Resource Trustees agree that, in order to maximize the effectiveness of efforts to restore injured Commencement Bay Environment natural resources, WDNR should, consistent with other duties imposed by law, exercise its management authority so as to minimize detrimental impacts on Commencement Bay Environment natural resources.

M. This Consent Decree only addresses claims by the Plaintiffs against WDNR for damages arising from injuries to natural resources resulting from releases of contaminants onto, at and from State-owned aquatic lands in the Commencement Bay Environment, including but not limited to the St. Paul Waterway. This Consent Decree does not address WDNR's liability, if any, to the United States on behalf of the Environmental Protection Agency, to the Washington Department of Ecology, or to the Puyallup Tribe of Indians, for any Removal, Remedial, or Response Action (as those terms are defined in Section 101 of CERCLA, 42

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

U.S.C. § 9601), or the costs thereof. Nor does this Consent Decree address WDNR's liability, if any, to the Natural Resources Trustees under CERCLA or other authority for Natural Resource Damages resulting from WDNR's activities, including ownership or management of lands, in areas outside of the Commencement Bay Environment.

N. The Natural Resource Trustees completed a pre-assessment screen in October of 1991. Preassessment Screen of Natural Resource Damages in the Commencement Bay Environment Due to Activities Taking Place In and About the Commencement Bay Nearshore/Tideflats (CB/NT) Superfund Site, October 29, 1991. The Trustees published a report on the results of Phase 1 of the damage assessment process in June 1995. Scientific research conducted on natural resources in Commencement Bay indicated that many urban and industrial activities have resulted in releases of hazardous substances that have contributed to the injury to natural resources identified in these studies. Based on this research, the Parties agree that, as to WDNR, no further natural resource damage assessment is required to effectuate the purposes of this Consent Decree. The Natural Resource Trustees have concluded that they can determine with a reasonable degree of certainty the level of damages appropriate to assign to WDNR.

O. WDNR denies each of the allegations of the complaint filed by the United States and further denies responsibility for the natural resource damages and any other costs or relief sought

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

by the Trustees. The parties agree that actions undertaken by WDNR in accordance with this Consent Decree do not constitute an admission of any violation of treaty, federal, state, or common law, or an admission of any liability by the WDNR to the United States, the State of Washington, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe. Nor shall this Consent Decree be used as evidence or as collateral estoppel against any party to this Decree in any action or proceeding other than an action or proceeding to enforce the terms of this Consent Decree.

P. The parties recognize, and the Court in entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith, that implementation of this Consent Decree will expedite the cleanup of contaminated sediments and the restoration of natural resources, avoid prolonged and complicated litigation between the parties, and that this Consent Decree is fair, reasonable, consistent with CERCLA, MTCA, and the regulations promulgated thereunder, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, before the adjudication of the merits of this case, and without admission of any law, fact, liability or responsibility by WDNR, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

III. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter of this action and the parties to this Consent Decree pursuant to 28 U.S.C. §§ 1331 and 1345, and Section 113(b) of CERCLA, 42 U.S.C.

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

§ 9613(b). This Court also has personal jurisdiction over WDNR which, solely with respect to this Consent Decree, waives all objections that it may have to jurisdiction of the Court or to venue in this District and to service of process.

IV. APPLICABILITY OF CONSENT DECREE

2. The provisions of this Consent Decree shall apply to and be binding on the parties to this Consent Decree, their agents and successors. Changes in the organizational form or status of a party shall have no effect on its obligations under this Consent Decree.

V. DEFINITIONS

3. This Consent Decree incorporates by reference the definitions set forth in Section 101 of CERCLA, 42 U.S.C. § 9601. Terms specifically defined in this Consent Decree have the meaning given to them by this Consent Decree. In addition, whenever the following terms are used in this Consent Decree, they shall have the following meanings:

a. "Commencement Bay Environment" means the waters of Commencement Bay, Washington, including the shoreline, intertidal areas and bottom sediments lying south of a line drawn from Point Defiance to Dash Point, and including the Thea Foss Waterway, the Wheeler-Osgood Waterway, the Middle Waterway, the St. Paul Waterway, the Milwaukee Waterway, the Sitcum Waterway, the Blair Waterway and the Hylebos Waterway. This area includes but is not limited to the Commencement Bay Nearshore/Tideflats Superfund

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

Site, as identified or amended by the U.S. EPA, and areas affected by releases of hazardous substances within the Commencement Bay Nearshore/Tideflats Superfund Site.

b. "Covered Matters" means any civil or administrative liability WDNR may have to the United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe, for any claim for Natural Resource Damages based on releases of hazardous substances into the Commencement Bay Environment prior to the effective date of this Consent Decree. "Covered Matters" also includes WDNR's obligations to Natural Resource Trustees which arise from the Consent Decree entered in this Court under United States, et al. v. Simpson-Tacoma Kraft Co., et al., Case No. 91-5260T. "Covered Matters" shall not be construed to include any matter under the authority of the United States, Washington Department of Ecology, Puyallup Tribe of Indians or Muckleshoot Indian Tribe, if any, that does not relate to recovery of Natural Resource Damages, including the authority to issue orders requiring removal or remedial action and actions to recover response costs associated with such response actions pursuant to CERCLA, Tribal Law and the Model Toxics Control Act, chapter 70.105D RCW, chapter 90.48 RCW, and the authority to administer and enforce the State Sediment Management Standards, chapter 173-204 WAC.

c. "Habitat Restoration Project" shall include activities to restore, rehabilitate, replace or enhance natural

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

resources and habitat functions. The primary purpose of such projects shall be to benefit Commencement Bay and marine natural resources and species dependent upon them that have been injured by releases of hazardous substances.

d. "Natural Resource Damages" means any damages, including all costs of damages assessment, for injury to, destruction of, or loss of any and all Natural Resources resulting in whole or in part from releases of hazardous substances into the Commencement Bay Environment, recoverable by the United States, the State of Washington, the Puyallup Tribe of Indians, or the Muckleshoot Indian Tribe in their capacities as Trustees on behalf of their respective publics under 42 U.S.C. § 9607, as amended, 33 U.S.C. § 1321, and chapter 70.105D RCW, chapter 90.48 RCW, or any other federal, state, tribal, or common law, except claims relating to treaties between the United States and the Puyallup Tribe of Indians, and/or the Muckleshoot Indian Tribe.

e. "Natural Resource Trustees" or "Trustees" means the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration, the United States Department of the Interior, the Washington Department of Ecology on behalf of the State of Washington, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe.

f. "Washington Department of Natural Resources" or "WDNR" means the State of Washington as owner of state-owned

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

aquatic lands as defined in RCW 79.90.010 as well as the Commissioner of Public Lands and the Washington Department of Natural Resources (including its predecessor agencies) as lessor, manager and/or the entity otherwise exercising the State of Washington's proprietary interest in such public lands.

VI. RESERVED PARCELS

4. a. WDNR and the Natural Resource Trustees have identified three parcels of aquatic land in the Commencement Bay Environment ("the Parcels") that will be subject to the terms of this Consent Decree:

> Parcel 1 consisting of those unplatted First Class Tidelands lying westerly of, and in front of, Block 2, Replat of Blocks 13 to 48, Tacoma Tidelands, formerly in King County, dated 1918, on file at the office of the Commissioner of Public Lands, in Olympia, Washington (also known as the "Ashton Replat"), containing approximately 4.8 acres.
>
> Parcel 2 consisting of those unplatted First Class Tidelands located below the line of Mean Low Tide and lying in front of the southeasterly 1/2 of Block 11, Tacoma Tidelands, as Surveyed and Platted by The Board of Appraisers of Tide and Shore Lands for King County, dated 1894-1895, and on file at the office of the Commissioner of Public Lands in Olympia, Washington, containing approximately 1.5 acres.
>
> Parcel 3 consisting of that portion of the beds of navigable waters of Commencement Bay located no less than 15 feet nor more than 25 feet below Mean Lower Low Water, and lying in front of Lot 7, Tacoma Tidelands, as Surveyed and Platted by The Board of Appraisers of Tide and Shore Lands for King County, dated 1894-1895, and on file at the office of the Commissioner of Public Lands in Olympia, Washington, containing approximately 2 acres.

b. Within sixty days following the effective date of this Consent Decree, WDNR shall commence a survey of the Parcels to accurately identify the Parcels that will be used for Habitat

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

Restoration Projects as hereinafter described. WDNR shall complete the survey and provide a written report of its results to the Natural Resource Trustees within ninety days after commencement of the survey.

c. Within one hundred fifty days following the effective date of this Consent Decree, WDNR shall remove each of the Parcels from its inventory of properties subject to lease and/or take such other administrative action as will permanently exempt each of the Parcels from lease or transfer.

d. WDNR agrees that the Natural Resource Trustees, in consultation with WDNR, may construct, maintain and monitor one or more Habitat Restoration Projects on each of the Parcels.

e. WDNR agrees that it will not lease, transfer ownership or management of, or abandon jurisdiction over any of the Parcels. WDNR further agrees that, without the prior written approval of all the Natural Resource Trustees, it will not take any action within the Commencement Bay Environment that would significantly diminish the functionality of any Habitat Restoration Project on any of the Parcels.

f. The Natural Resource Trustees agree to require that any contractor who performs work for or on behalf of the Natural Resource Trustees on any of the Parcels shall agree to indemnify and save WDNR harmless against all claims of any nature, including, but not limited to, claims by third parties for death, personal injury, or property damage, and claims for environmental

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

liability that arise as the result of negligent acts or omissions of such contractors, their employees and agents, while they are present on any of the Parcels.

g. The parties expressly disclaim any intention to effect a transfer to any of the Plaintiffs of any property interest in the Parcels as a consequence of entering into this Consent Decree or of any action taken under this Consent Decree. To the extent permitted by law, WDNR shall hold the Natural Resource Trustees harmless and shall indemnify and defend the Natural Resource Trustees against any claim that may be asserted by any person against the Natural Resource Trustees due to the presence of Historic Contamination on, in, under or about the Parcels except for claims arising from the sole or concurrent negligence of any of the Natural Resource Trustees in connection with hazardous substances on, in, under or about the Parcels. If, irrespective of the Parties' intent, any property interest is transferred to the Natural Resource Trustees by operation of law pursuant to this Consent Decree, it is the Parties' intent that such transfer shall not create liability for future cleanup, remediation and/or Natural Resource Damages due to the presence of Historic Contamination that remains on, in, under or about the Parcels as of the date that such interest is deemed to have transferred.

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

VII. ACCESS

5. Commencing upon the date of lodging of this Consent Decree, WDNR agrees to provide the Trustees and their contractors access at all reasonable times to the Parcels subject to the terms of this Consent Decree and to any property to which access is required for the oversight or implementation of this Consent Decree. The Natural Resource Trustees shall give notice to WDNR prior to access for purposes of sampling or performing maintenance on any of the Parcels. Each Trustee shall have the authority to enter freely and move about such property at all reasonable times for the purposes of overseeing the requirements of this Consent Decree, including, but not limited to:

a. Monitoring and assessing progress on the planning, development, maintenance and monitoring of the Habitat Restoration Projects;

b. Verifying any data or information submitted to the Trustees;

c. Conducting such tests, investigations or sample collections as deemed necessary to monitor compliance with this Consent Decree or to assist in further identifying and quantifying natural resource injuries requiring restoration actions and in planning and carrying out further restoration actions;

d. Using a camera, sound recording device or other type equipment to record the work done under this Consent Decree or injury to natural resources; and

e. Undertaking any maintenance action the Trustees determine necessary.

6. WDNR shall have the right to accompany any Trustee or its representative on the property. Anyone provided access

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

through this Consent Decree shall comply with applicable health and safety requirements and shall not interfere, to the extent practicable, WDNR authorized activities.

VIII. IN-KIND SERVICES

7. a. WDNR agrees that it will participate in the selection, planning, design, implementation, monitoring and management of each Habitat Restoration Project the Natural Resource Trustees and WDNR may elect to create on any of the Parcels. As the Natural Resource Trustees are undertaking activities with regard to the Habitat Resource Projects and identify services that WDNR may be able to provide, the Natural Resource Trustees will request that WDNR provide such services, and WDNR agrees to discuss the Trustees' request for services with the Trustees. WDNR's participation may include, after consultation with the Natural Resource Trustees, the providing of scientific consultation, project management services, cadastral surveying, photogrammetry, underwater investigations and inventories, and geographic information system services. Such participation shall include the active involvement of WDNR staff in such activities. WDNR shall not be obliged to contract with outside consultants, or to purchase or lease specific equipment, supplies or materials in satisfaction of its obligations under this subparagraph.

b. WDNR shall not seek reimbursement of its costs incurred under subparagraph a. from any Natural Resource Damages

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

collected by the Plaintiffs from third parties.

c. It is understood and agreed that WDNR, and its agents, officers, employees and contractors, in the performance of any of the work or services provided under this Consent Decree as in-kind contributions, shall act as independent contractors and not as agents or employees of any other party to this Consent Decree.

d. All in-kind services provided by WDNR under this Consent Decree shall be subject to oversight by the Trustees. WDNR may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 15 C.F.R. § 4.7. Documents or information determined to be confidential by the United States will be afforded the protection specified in 15 C.F.R. Part 4. If no claim of confidentiality accompanies documents or information when they are submitted to the Plaintiffs, or if the United States has notified WDNR that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA and 15 C.F.R. § 4.7, the public may be given access to such documents or information without further notice to WDNR.

e. WDNR has committed approximately 1.5 full time equivalent employees per year to participation in Natural Resource Trustee activities in the Commencement Bay Environment

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

for the 1995-1997 State fiscal biennium. WDNR expects the Legislature to appropriate sufficient funds to allow continuation of this level of participation into the next state fiscal biennium and to make appropriate additional services, as noted in paragraph 7 and in recital K, available on a project-by-project basis for restoration activities on the Parcels and within the Commencement Bay Environment.

IX. NATURAL RESOURCE IMPACTS CONSULTATION

8. WDNR agrees, upon request of the Natural Resource Trustees, to consult with the Natural Resource Trustees regarding material impacts or potential material impacts that its actions, planned actions or failure to act may have upon Commencement Bay Environment marine resources. Natural Resource Trustees may provide all data and analyses which tend to indicate impacts, or lack thereof, on the Parcels. WDNR agrees that it will work with the Natural Resource Trustees in good faith to identify promptly the impacts on Commencement Bay Environment marine resources caused or potentially caused by WDNR's actions or inaction, and to identify in a timely manner corrective measures needed to prevent or alleviate detrimental impacts. The obligations under this paragraph shall only extend to December 31, 2045.

X. COVENANTS NOT TO SUE

9. a. In consideration of the actions that will be performed by WDNR in lieu of and equivalent to damages under the terms of this Consent Decree, and except as specifically provided

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

in paragraphs 10, 11, and 12, the United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe covenant not to sue or to take any other civil or administrative action against the WDNR for Covered Matters.

b. Except as specifically provided in paragraph 15, WDNR hereby covenants not to sue or to take any other civil or administrative action against the United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe for any claims relating to or arising from the Covered Matters or the filing of the complaint herein.

c. These covenants not to sue and the following reservation of rights shall take effect upon entry of this Consent Decree by the Court, subject to the parties' rights to void the Consent Decree pursuant to paragraph 21.b. if the Court declines to approve the Consent Decree as presented. These covenants not to sue remain in effect so long as WDNR and the Natural Resource Trustees are fulfilling or have fulfilled their obligations under this Consent Decree.

XI. RESERVATION OF RIGHTS

10. WDNR shall remain liable to the extent that it is liable under existing law, or as it may be amended, for the removal and/or remediation of any hazardous substances or for response costs associated therewith, including all known or subsequently discovered hazardous substances, that remain on, in,

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

under or about the Parcels as of the effective date of the Consent Decree ("Historical Contamination"). WDNR shall remain liable, to the extent noted in the preceding sentence, for all monitoring, testing or other ongoing or future requirements regarding cleanup or remediation of Historic Contamination on, in, under or about the Parcels that either have been, or may in the future be, imposed by any lawful means.

11. The covenants not to sue set forth in Paragraph 9 a. and b. above pertain only to Covered Matters. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, and this Consent Decree is without prejudice to, all rights against WDNR with respect to all other matters, including but not limited to the following:

a. Claims under applicable law seeking to compel WDNR to perform removal or remedial activities, or seeking to recover the costs of removal or remedial activities including any enforcement activities related thereto;

b. Claims arising from the past, present or future disposal, release or threat of a release of hazardous substances in areas other than the Commencement Bay Environment;

c. Claims for recovery of Natural Resource Damages in the Commencement Bay Environment based on conditions resulting from a release of hazardous substances after the effective date of this Consent Decree and that are actionable under treaty, federal, state or tribal law;

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

d. Non-monetary claims based on a failure by WDNR to satisfy requirements of this Consent Decree;

e. Claims for criminal liability;

f. Claims for Natural Resource Damages if conditions, information, or factors in the Commencement Bay Environment not known to the Trustees at the time of entry of this Consent Decree are discovered that, together with any other relevant information, indicates (1) that there is injury or threat of injury to, destruction of, or loss of natural resources of a type unknown, or of a magnitude greater than was known, at the time of the entry of this Consent Decree; or (2) that WDNR is responsible for releases of hazardous substances to the Commencement Bay Environment other than solely as a consequence of its ownership/management of State-owned aquatic lands, and that those releases have resulted in injury to, destruction of, or loss of natural resources;

g. Liability for violations of applicable federal, state or tribal laws or regulations (other than Covered Matters) by WDNR in complying with and implementing this Consent Decree; and

12. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, and this Consent Decree is without prejudice to, liability of the State of Washington by or through a state agency other than WDNR.

13. The United States' consent to this Consent Decree and

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

participation in this settlement is solely on its own behalf and not as a trustee for any Indian Tribe.

14. The United States, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe covenant not to seek double recovery of Natural Resource Damages from WDNR for injuries within the Commencement Bay Environment for Covered Matters by bringing claims pursuant to Treaties between the United States and the Puyallup Tribe of Indians and/or the Muckleshoot Indian Tribe.

15. Notwithstanding any other provision of this Consent Decree, WDNR reserves the right to institute proceedings against the United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe for the claims based on a failure by the United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe to fulfill their obligations under this Consent Decree. WDNR's reservations of rights pursuant to this subparagraph do not include claims against the Natural Resource Trustees for monetary relief. Nothing in this paragraph is intended to constitute a waiver of any sovereign immunity defense that may be available to any of the Natural Resource Trustees.

XII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

16. a. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the Parties

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Commencement Bay Environment against any person not a party hereto.

b. The United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe acknowledge and agree that fulfillment of the commitments made by WDNR pursuant to this Consent Decree represents a good faith settlement and compromise of disputed claims and that the settlement represents a fair, reasonable and equitable discharge of WDNR's liability for Covered Matters. WDNR shall have the benefits of Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), RCW 70.105D.040(4)(d), RCW 4.22.060(2), and any other applicable statute or other law limiting or extinguishing its contribution liability to persons not a party to this Consent Decree for Covered Matters and affording WDNR rights of contribution or other rights to recover from such persons for costs or damages.

c. The United States, the Washington Department of Ecology, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe certify that timely fulfillment of the commitments made by WDNR pursuant to this Consent Decree will be appropriate actions necessary to protect and restore the natural resources allegedly injured by the releases of hazardous substances in the

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

Commencement Bay Environment for which WDNR may be liable and that fulfillment of those commitments satisfies the requirements of Section 122(j)(2) of CERCLA, 42 U.S.C. § 9622(j)(2).

d. Other than with regard to Covered Matters, in any subsequent administrative or judicial proceeding initiated by the Plaintiffs for injunctive relief, recovery of response costs, or other appropriate relief, WDNR shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Plaintiffs in the subsequent proceeding were or should have been brought in the instant case. However, nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraph 9 a. and b.

XIII. RETENTION OF JURISDICTION/DISPUTE RESOLUTION

17. a. The Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for purposes of entering such further orders, direction, or relief as may be appropriate for the construction, implementation, enforcement or modification of this Consent Decree, or to resolve disputes in accordance with this paragraph.

b. In the event a dispute should arise between WDNR and the Natural Resource Trustees regarding the interpretation or implementation of the terms of this Consent Decree, the parties shall make all good faith efforts to resolve the dispute prior to

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

invoking the continuing jurisdiction of the Court. Prior to invoking the Court's jurisdiction to resolve a dispute a Party shall deliver to each of the other parties a written statement detailing the matters in dispute and proposing terms to resolve the dispute. Except where the party seeking to invoke the Court's jurisdiction can demonstrate a compelling need for a more prompt resolution, such statement of the dispute must be delivered to each of the other parties at least sixty days prior to filing any motion or application for relief from the Court.

c. In resolving disputed matters presented to it, the Court shall be guided by the terms and purposes of this Consent Decree, the legal restraints placed on the parties, and the parties' mutual goal of attempting to benefit those Commencement Bay Environment marine natural resources and species dependent upon them that have been injured by releases of hazardous substances.

XIV. NOTICES AND SUBMISSIONS

18. Whenever, under the terms of this Consent Decree, written notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: DJ# 90-11-2-1049B

As to the National Oceanic and Atmospheric Administration:

Chief, Damage Assessment Center
NOAA/N/ORCAx1
Room 10218
1305 East West Highway
Silver Spring, MD 20910

Robert A. Taylor
NOAA GC Natural Resources NW
7600 Sand Point Way, N.E.
Seattle, Washington 98115-0070

As to the Department of the Interior:

Director, Olympia Field Office
U.S. Fish and Wildlife Service
3704 Griffin Lane S.E., Suite 102
Olympia, WA 98501-2192

As to the Washington Department of Ecology:

Toxics Cleanup Program
State of Washington
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

As to the Puyallup Tribe of Indians:

Director
Environmental Protection Department
Puyallup Tribe of Indians
2002 East 28th Street
Tacoma, WA 98404

Michael P. O'Connell
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98101

As to the Muckleshoot Indian Tribe:

Chair
Muckleshoot Indian Tribe
39015 172nd Avenue SE
Auburn, WA 98092

and

Office of the Tribal Attorney
Muckleshoot Indian Tribe
39015 172nd Avenue SE
Auburn, WA 98092

As to WDNR:

Division Manager
Aquatic Resources Division
Department of Natural Resources
P.O. Box 47001
Olympia, WA 98504-7001

XV. GENERAL PROVISIONS

19. a. The Complaint states claims upon which relief may be granted.

b. If for any reason the Court should decline to approve this Consent Decree in the form presented, any statements made in negotiation and the terms herein may not be used as evidence in any litigation or administrative proceeding.

c. This Consent Decree shall not be construed in any

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

way to relieve the parties to this Consent Decree or any other person or entity from the obligation to comply with any federal, state, Tribal, or local law.

d. This Consent Decree does not relieve or otherwise satisfy any obligation or liability of any person or entity not a party to this Consent Decree. Each of the parties expressly reserves any and all rights (including the right to contribution protection), defenses, claims, demands and causes of action that each party may have with respect to any matter, transaction or occurrence relating in any way to the Commencement Bay Environment against any person not a party hereto.

e. Nothing in this Consent Decree shall be construed to require any governmental entity to spend state or federal funds not appropriated for or allocated to obligations identified under this Consent Decree.

f. The Consent Decree may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

g. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XVI. MODIFICATION

20. The terms of this Consent Decree may be modified only by a subsequent written agreement by the U.S. Department of Justice, the Natural Resource Trustees, and WDNR and approval by

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

the Court as a modification to this Consent Decree.

XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

21. a. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment consistent with the procedures in Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate.

b. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the parties.

XVIII. EFFECTIVE DATE

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

XIX. SIGNATORIES/SERVICE

23. a. The undersigned representative of WDNR, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice on behalf of the Federal Trustees, and the undersigned representative for each of the other Plaintiffs certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

to execute and legally bind such party to this document.

b. WDNR shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of WDNR with respect to all matters arising under or relating to this Consent Decree. WDNR hereby agrees to accept service in that manner.

SO ORDERED THIS _____ DAY OF _____, 1996.

_____

UNITED STATES DISTRICT JUDGE

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States, et al. v. State of Washington through the Washington Department of Natural Resources relating to the Commencement Bay Environment.

FOR THE UNITED STATES OF AMERICA

Dated: 4/27/97

LOIS J. SCHIFFER
Assistant Attorney General
Environmental Enforcement Section
Environment & Nat. Res. Division
U.S. Department of Justice
Washington, D.C. 20530

Dated: April 4, 1997

THOMAS W. SWEGLE
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3143

OF COUNSEL:
Robert Taylor, Esquire
National Oceanic and Atmospheric Administration
GC Natural Resources NW
7600 Sand Point Way, N.E.
Seattle, Washington 98115-0070

Barry Stein, Esquire
Department of the Interior
Office of the Solicitor
Pacific Northwest Region
500 N.E. Multnomah Street
Suite 607
Portland, OR 97232

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

FOR THE STATE OF WASHINGTON
AS NATURAL RESOURCE TRUSTEE

Dated: 12/23/96

DAN SILVER
Assistant Director of Waste Programs

Dated: 1/3/97

Mary McCrea

MARY McCREA
Assistant Attorney General

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

PUYALLUP TRIBE OF INDIANS

Dated: 1/22/97

Bill Sterud

~~CARL~~ WILLIAM ~~STERUD~~, Chairman

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

MUCKLESHOOT INDIAN TRIBE

Dated: 1/14/97

VIRGINIA CROSS, Chairperson

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

FOR THE STATE OF WASHINGTON
THROUGH THE WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Dated: 1/24/97

Kaleen Cottingham

KALEEN COTTINGHAM
Supervisor

For matters arising under or relating to the Consent Decree, service may be made on the Natural Resources Division, Office of the Attorney General, State of Washington, P.O. Box 40100, Olympia, Washington, 98504, and on the Division Manager, Aquatic Resources Division, Washington State Department of Natural Resources, P.O. Box 47001, Olympia, WA 98504-7001.

Thomas W. Swegle
Wash. State Bar No. 15667
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143