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Honorable _____

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

UNITED STATES OF AMERICA, STATE OF WASHINGTON, PUYALLUP TRIBE OF INDIANS and MUCKLESHOOT INDIAN TRIBE	)	CIVIL NO.
Plaintiffs,	)	CONSENT DECREE
vs.	)	
FOSS MARITIME COMPANY, and MARINE INDUSTRIES NORTHWEST, INC.,	)	
Defendants.	)	

U.S. Department of Justice
NOAA GC - DOJ DARC
7600 Sand Point Way NE
Seattle, WA 98115-0070
(206) 526-6604

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I. INTRODUCTION

The United States of America ("United States"), on behalf of the National Oceanic and Atmospheric Administration ("NOAA") and the United States Department of the Interior; the State of Washington (the "State") through the Washington Department of Ecology; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe (collectively, "Plaintiffs"), have filed a complaint in this case against defendants Foss Maritime Company ("Foss Maritime"), a Washington company, and Marine Industries Northwest, Inc. ("MINI), a Washington corporation, (collectively "Defendants") pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9607; the Model Toxics Control Act (MTCA), chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A). This Consent Decree (the "Decree") addresses the claims asserted in the Complaint against Defendants for Natural Resource Damages (as defined below) in the Commencement Bay Environment (as defined below).

II. RECITALS

A. The United States Department of Commerce, acting through NOAA; the United States Department of the Interior; the Washington State Department of Ecology on behalf of the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe (collectively, the "Trustees" and, individually, a "Trustee"), under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section 1006(b) of OPA, 33 U.S.C. § 2706(b), and 40 C.F.R. Part 300, subpart G, serve as trustees for natural resources for the assessment and recovery of damages for injury to, destruction of, or loss of natural resources under their trusteeship.

B. Investigations conducted by the United States Environmental Protection Agency

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("EPA"), the Trustees and others have detected hazardous substances in the sediments, soils and groundwater of the Commencement Bay Environment, including but not limited to arsenic, antimony, cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2-ethylhexyl)-phthalate, hexachlorobenzine, hexachlorobutadiene, polycyclic aromatic hydrocarbons, and polychlorinated biphenyls. In particular, the Trustees have documented the presence of over 18 hazardous substances in the marine sediments of Commencement Bay's Middle Waterway.

C. The Trustees began assessing natural resource damages in the Commencement Bay Environment in October 1991 by finding that hazardous substances had been released into the Commencement Bay Environment; that public trust natural resources had likely been injured by the releases; that data sufficient to pursue a natural resource damage assessment were available or could likely be obtained at a reasonable cost; and that, without further action, implemented and planned response actions would not adequately remedy the resource injuries. *See* 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 notified representatives of known potentially responsible parties ("PRPs") of their intent to conduct a damage assessment. The Trustees subsequently entered into a Funding and Participation Agreement for Phase 1 of the Commencement Bay-Wide Natural Resource Damage Assessment, dated February 10, 1993, with several of the major PRPs. The Trustees published a report on the results of Phase 1 of the damage assessment process in June 1995. The PRPs did not participate in subsequent stages of the damage assessment, and the Trustees continued the process independently. The Trustees have now completed a series of studies during Phase 2 of the damage assessment, focusing on impacts of contaminants on marine sediments, benthic organisms, flatfish

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and salmonids. Results of those studies were published in a series of reports, consisting of Commencement Bay Natural Resource Trustees, 1996, Hylebos Waterway Data and Data Analysis Report; Collier, T.K., L.L. Johnson, M.S. Myers, C.M. Stehr, M.M. Krahn, and J.E. Stein, 1998, Fish injury in the Hylebos Waterway in Commencement Bay, Washington; Mary R. Arkoosh, Ed Casillas, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical Contaminants from the Hylebos Waterway on Disease Resistance of Juvenile Salmon; Ed Casillas, Bich-Thuy L. Eberhart, Frank C. Sommers, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical Contaminants from the Hylebos Waterway on Growth of Juvenile Chinook Salmon; and Ed Casillas, Bich-Thuy L. Eberhart, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Exposure of Juvenile Chinook Salmon to Chemical Contaminants Specific to the Hylebos Waterway. While the Trustees' studies were specific to the nearby Hylebos Waterway, the Trustees assert that the study results are equally applicable to the circumstances of the Middle Waterway. Based on this research and information developed by EPA in connection with the Superfund remedial process, the Plaintiffs and Defendants (collectively, the "Parties" and, individually, a "Party") agree that no further natural resource damage assessment is required to effectuate the purposes of this Consent Decree, with respect to Defendants.

D. Plaintiffs have filed a complaint (the "Complaint") pursuant to section 107 of CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW; CWA, 33 U.S.C. §§ 1251 et seq.; and OPA, 33 U.S.C. §§ 2701 et seq., seeking recovery from Defendants of damages for injury to, destruction of, and loss of natural resources resulting from releases of hazardous substances into the Commencement Bay Environment, including the costs of assessing the damages.

E. Plaintiffs allege in the Complaint that each Defendant owns or in the past owned

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and/or operated real property or facilities from which storm water, surface water runoff, wastewater, other process discharges, and/or groundwater have flowed to the Commencement Bay Environment. Plaintiffs also allege that investigations by EPA and others have detected concentrations of hazardous substances in soils, groundwater and/or sediments on or in those properties or facilities. Some of these hazardous substances are found in the sediments of the Commencement Bay Environment.

F. Plaintiffs further allege that hazardous substances have been or are being released to the Commencement Bay Environment from properties or facilities owned and/or operated by each Defendant through direct discharge, surface water runoff, groundwater and/or seeps, and that those hazardous substances have caused injury to, destruction of and loss of natural resources in the Commencement Bay Environment under Plaintiffs' trusteeship, including fish, shellfish, invertebrates, birds, marine sediments, and resources of cultural significance. Plaintiffs further allege that each of them and the public have suffered the loss of natural resource services (including ecological services as well as direct and passive human use losses) as a consequence of those injuries.

G. Plaintiffs allege that each Defendants is (a) the owner and/or operator of a vessel or a facility; (b) a person who at the time of disposal or release of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of; (c) a person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, or otherwise generated any hazardous substance disposed of or treated, at any facility or incineration vessel owned or operated by another party or entity and containing such

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hazardous substances; and/or (d) a person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person from which there is a release or a threatened release of a hazardous substance that causes the incurrence of response costs within the meaning of 42 U.S.C. § 9607 and RCW 70.105D.040.

H. Defendants each deny all the allegations of the Complaint.

I. Although the Trustees have initiated but not yet completed a natural resource damage assessment for the Commencement Bay Environment, the Trustees have developed and analyzed information sufficient to support a settlement that is fair, reasonable and in the public interest.

J. To facilitate resolving natural resource damage claims, relying upon the results of the damage-assessment studies, remedial investigations, regulatory standards, and scientific literature, the Trustees developed an estimate of the amount of injury to natural resources that had occurred as a result of releases of hazardous substances to the Middle Waterway. The Trustees quantified the effects of the injuries in terms of the losses of ecological services over affected areas of the waterways and over time, discounted to the current year. The Trustees used the term discounted ecological service acre-years ("DSAYs") to describe both the scale of the injuries, and the amount of habitat restoration they are seeking to compensate for the injuries.

K. Plaintiffs assert that hazardous-substance releases to the Middle Waterway have become dispersed and commingled to the extent that the effects of one PRP's releases cannot be readily distinguished from another's. Plaintiffs further assert that the circumstances of the Middle Waterway contamination make all PRPs who contributed to the contamination jointly and severally liable for all injuries to natural resources that have resulted from the contamination. As a consequence, Plaintiffs assert the right to recover for the loss of all the calculated DSAYs and

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associated damage assessment costs from any Middle Waterway PRP. Without prejudice to their position and solely for purposes of facilitating settlement with individual PRPs, the Trustees have determined that settling with Defendants for a portion of the natural resource damages attributable to all waterway sources would result in a fair and equitable resolution of the Trustees' claims. Taking into consideration prior settlements with other PRPs who bore some liability for hazardous substance contamination of the Middle Waterway and releases of hazardous substances by non-settling parties, the Trustees have agreed to settle their claims for the equivalent of 139 DSAYs, a portion of the Trustees' unreimbursed damage assessment costs, plus a contribution by Defendants to the Trustees' long-term habitat oversight and stewardship activities. The Trustees' allocation of liability to Defendants for settlement purposes is intended also to address hazardous substances releases attributable to Pioneer Industries, Inc., a dissolved corporation.

L. The Trustees quantified natural resource damages for the Middle Waterway in terms of DSAYs in order to encourage settling parties to resolve their liability by constructing habitat restoration projects. To address a portion of their allocated liability, Defendants have agreed to preserve the site of a former marine dock on a parcel at the mouth of Middle Waterway in perpetuity for use as a habitat restoration site. To address the balance of their allocated liability, Defendants have elected to enter into a cash-based settlement, based on the Trustees' currently estimated cost of constructing required restoration projects themselves. In light of on-going and anticipated restoration activities, the Trustees have estimated the cash damages equivalent of the remaining DSAYs allocated to Defendants to total $7,802,081.29. Defendants have agreed to pay this sum plus $300,000.00 toward the Trustees' long-term restoration project oversight and stewardship activities, and $700,000.00 to reimburse Trustee damage assessment costs. In return the Trustees have agreed

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to covenant not to sue Defendants for Natural Resource Damages as provided below in Paragraph 20.

M. Defendants do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the Complaint.

N. Plaintiffs and Defendants agree, and this Court by entering this Decree finds, that this Decree has been negotiated by the Parties in good faith; that settlement of this matter will avoid prolonged and complicated litigation between the Parties; and that this Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

III. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1367, 42 U.S.C. §§ 9607 and 9613(b), and 33 U.S.C. § 2717(b). The Court has personal jurisdiction over the Parties. Solely for the purposes of this Decree and the underlying Complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties may not challenge the terms of this Decree or this Court's jurisdiction to enter and enforce this Decree.

IV. PARTIES BOUND

2. This Decree is binding upon the United States, the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and upon Defendants and their heirs, successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer

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of assets or real or personal property, will in no way alter the status or responsibilities of Defendants under this Decree.

V. DEFINITIONS

3. Unless otherwise expressly provided, terms used in this Decree that are defined in CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in CERCLA or in such regulations. Whenever the terms listed below are used in this Decree or in any attached appendix, the following definitions will apply:

a. "Commencement Bay Environment" means the waters of Commencement Bay, State of Washington -- including the shoreline, intertidal areas, tributaries, drainage areas, estuaries and bottom sediments -- lying south of a line drawn from Point Defiance to Dash Point. These waters include the Thea Foss Waterway, Wheeler-Osgood Waterway, Middle Waterway, St. Paul Waterway, Puyallup River from the mouth south to the present City limits, Milwaukee Waterway, Sitcum Waterway, Blair Waterway, and Middle Waterway. This area includes but is not limited to the Commencement Bay Nearshore/Tideflats Superfund Site, as identified or amended by the EPA, and areas affected by releases of hazardous substances within the Commencement Bay Nearshore/Tideflats Superfund Site.

b. "Commencement Bay Restoration Account" means the Commencement Bay Natural Resource Restoration Account authorized by the Order Directing the Deposit of Natural Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No. C93-5462B (W.D. Wash. Oct. 8, 1993) (attached as Appendix A).

c. "Cooks Marine Dock Site" means that portion of Pierce County tax parcel 8950000741, described in Appendix B to this Decree, at the end of the peninsula between Middle

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Waterway and Thea Foss Waterway, that Defendants will make available in perpetuity for a habitat restoration site in accordance with Section VII of this Decree.

d. "Consent Decree" or "Decree" means this Consent Decree and all attached appendices. In the event of a conflict between this Consent Decree and any Appendix, the Consent Decree will control.

e. "Day" means a calendar day. In computing any period of time under this Consent Decree, where the last day falls on a Saturday, Sunday, or federal holiday, the period of time will run until the close of business of the next working day.

f. "DSAYs" means discounted ecological service acre-years, the metric established by the Trustees to determine the scale of Natural Resource Damages liability associated with the Middle Waterway and the natural resource restoration efforts needed to compensate for injury to, destruction or loss of natural resources giving rise to liability.

g. "Defendants" means Foss Maritime and MINI.

h. "Natural Resources" means that definition as provided in 42 U.S.C. § 9601(16).

i. "Natural Resource Damages" means damages, including costs of damage assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW; Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A); and Chapter 90.48 RCW, for injury to, destruction of, or loss of natural resources resulting from releases of hazardous substances or discharges of oil to the Commencement Bay Environment at or from sites along, adjacent to or draining to the Middle Waterway.

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j. "Parties" mean the United States, the State of Washington, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, Foss Maritime, and MINI.

k. "Plaintiffs" means the United States, the State, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe.

l. "Trustees" mean the United States Department of Commerce, acting through NOAA; the Department of the Interior; the Washington State Department of Ecology, on behalf of the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe.

VI. GENERAL PROVISIONS

4. The Complaint states claims upon which relief may be granted.

5. Nothing in this Consent Decree shall be construed as an admission of liability by any of the Defendants for any claims or allegations made in the Complaint or in this Consent Decree.

VII. PRESERVATION OF COOKS MARINE DOCK SITE

6. Defendant Foss Maritime agrees to make the Cooks Marine Dock Site, as described in Appendix B, available in perpetuity for the purposes of habitat preservation and restoration.

7. As part of any conveyance of the Cooks Marine Dock Site, Defendant Foss Maritime shall include in the deed, lease or other instrument of conveyance the Restrictive Covenant and Grant of Entry set forth in Appendix C hereto. Defendant Foss Maritime shall abide, and shall cause its subsidiaries and affiliates to abide, by the same restrictions so long as any of them own the Cooks Marine Dock Site.

8. Within 30 days of entry of this Decree, Defendant Foss Maritime shall record in the applicable real property records for the real property comprising the Cooks Marine Dock Site a notice, substantially in the form included in Appendix D hereto, which is intended to inform

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prospective purchasers or lessees of the existence of this Consent Decree and of the fact that the transfer and use of the parcel are subject to the requirements and restrictions of this Consent Decree, including those detailed in Paragraphs 6 and 7 above.

9. Defendant Foss Maritime shall not sell, grant, lease or otherwise transfer to any party an interest in the real property comprising the Cooks Marine Dock Site other than as specifically contemplated in this Consent Decree without the prior written consent of the Trustees, and the United States Department of Justice ("DOJ"), and the approval of the Court.

10. Defendants shall avoid taking any action on the Cooks Marine Dock Site property or on adjacent property owned or controlled by any Defendant that would substantially diminish the value of the Cooks Marine Dock Site as natural resource habitat. Provided, however, Foss Maritime and MINI (including their agents, contractors, successors and assigns) are authorized to continue their use of and operations on adjacent property, and their use and operations within Middle Waterway, in accordance with their current operations and the Department of Natural Resources Use Authorizations No. 20-076410 (for Foss Maritime) and No. 20-076414 (for MINI) (including amendments thereto and successor Use Agreements), and such continuing use and operations shall not be considered an interference with, or diminishment of, the Restrictive Covenant for the Cooks Marine Dock Site set forth in Appendix C.

VIII. PAYMENT OF NATURAL RESOURCE DAMAGES, DAMAGE ASSESSMENT COSTS, AND LONG-TERM OVERSIGHT AND STEWARDSHIP

11. Within 30 days of entry of this Decree, Defendants will pay to the Trustees $8,102,081.29, consisting of $7,802,081.29 for Natural Resource Damages plus $300,000.00 to contribute to the Trustees' long-term oversight and stewardship activities. This payment will be

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made by a certified check made payable to the Clerk of the Court. This check will be deposited in the Commencement Bay Natural Resource Restoration Account.

12. Within 30 days of entry of this Decree, Defendant will pay to the Trustees sums totaling $700,000.00 in damage assessment costs. These sums shall be paid in the following amounts and particulars:

Trustee: National Oceanic and Atmospheric Administration
Amount: $346,324.87

Trustee: U.S. Department of the Interior
Amount: $237,813.45

Payments to NOAA and the U.S. Department of the Interior shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures. Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the U.S. Attorney's Office of the Western District of Washington. Any payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall be credited on the next business day. Defendant shall provide at least five days notice to the Financial Litigation Unit before making the transfer.

Payments to the other Trustees shall be made by certified checks, bearing the notation "Middle Waterway - Commencement Bay Assessment Costs," in the amounts indicated and made payable and addressed as follows:

Trustee: State of Washington
Amount: $63,921.39
Payee: State of Washington/Department of Ecology
Address: State of Washington
Department of Ecology
Attention: Fiscal Office

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P.O. Box 47611
Lacey, WA 98504-7611

Trustee: Puyallup Tribe of Indians
Amount: $45,877.77
Payee: Puyallup Tribe of Indians
Address: Mr. William Sullivan
Environmental Protection Department
Puyallup Tribe of Indians
3009 Portland Avenue
Tacoma, WA 98404

Trustee: Muckleshoot Indian Tribe
Amount: $6,062.52
Payee: Muckleshoot Indian Tribe
Address: Mr. Rob Otsea
Office of the Tribal Attorney
Muckleshoot Indian Tribe
39015 172nd Avenue S.E.
Auburn, WA 98002

13. At the time of each payment Defendant will send notice that payment has been made to the Trustees and DOJ in accordance with Section XIV (Notices and Submissions). Such notice will reference Commencement Bay NRDA, DOJ case number 90-11-2-729/2, and the civil action number.

IX. FAILURE TO MAKE TIMELY PAYMENT

14. If Defendants fail to make the payments required by Paragraphs 11 and 12 by the required due date, interest shall be assessed at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1

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of each year. Interest will continue to accrue on the unpaid balance through the date of payment.

X. STIPULATED PENALTIES

15. In the event that Defendants exceed the deadline provided for one of the activities described below, Defendants shall, as a stipulated penalty, increase the financial contributions it makes under this Consent Decree to fund habitat restoration actions, over and above any payments required elsewhere under this Consent Decree, as follows:

a. For each week Defendants fail to comply with the deadline provided in Paragraph 8 for recording notice of the Restrictive Covenant, or in Paragraphs 11 or 12 for paying the sums identified therein, Defendants shall pay a stipulated penalty in the amount of $1,000. Where the delay extends beyond the second week, the stipulated penalty shall apply to each additional day of delay for each such missed deadline. For purposes of this Subparagraph, a week shall equal a continuous period of seven days.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by the Trustees. All payments to the Trustees under this Paragraph will be made by a certified check made payable to the Clerk of the Court. This check will be deposited in the Commencement Bay Restoration Account.

c. At the time of each payment, Defendants will send notice that payment has been made to the Trustees and DOJ in accordance with Section XVI (Notices and Submissions). This notice will reference Commencement Bay NRDA, DOJ Case Number 90-11-2-1049, and the civil action number.

d. Penalties will accrue as provided in this Paragraph regardless of whether the Trustees have notified Defendants of the violation or made a demand for payment, but the penalties

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need only be paid upon demand. All penalties will begin to accrue on the day after performance or payment is due and will continue to accrue through the date of performance or payment. Nothing in this Decree prevents the simultaneous accrual of separate penalties for separate violations of this Decree. Defendants may dispute the Trustees' right to the penalties identified herein by invoking the dispute resolution procedures of Section XXII.

16. If Plaintiffs bring an action to enforce this Decree, Defendants will reimburse Plaintiffs for all costs of such action, including but not limited to costs of attorney time.

17. Payments made under this Section are in addition to any other remedies or sanctions available to Plaintiffs by virtue of Defendants' failure to comply with the requirements of this Decree.

18. Notwithstanding any other provision of this Section, Plaintiffs may, in their unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree. Payment of stipulated penalties does not excuse Defendants from payment as required by Section VIII or from performance of any other requirement of this Consent Decree.

19. The Trustees may use sums paid as stipulated penalties under Paragraph 15 to pay unreimbursed damage assessment costs, to fund or contribute to additional actions to restore Commencement Bay natural resources, and/or for long-term restoration project oversight and stewardship.

XI. COVENANT NOT TO SUE BY PLAINTIFFS

20. Except as specifically provided in Section XII (Reservations of Rights) below, Plaintiffs covenant not to sue or to take administrative action against Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311 of the Clean Water

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Act (CWA), 33 U.S.C. § 1321; Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(a); or Chapter 90.48 RCW to recover Natural Resource Damages. This covenant not to sue will take effect upon the later of the recording of the Restrictive Covenant required by Paragraph 8 or receipt by the Registry of the Court of the payment required by Paragraph 11 or receipt by all Trustees of the payments required by Paragraph 12. This covenant not to sue is conditioned upon the satisfactory performance by Defendants of their obligations under this Decree. This covenant not to sue extends only to Defendants and their heirs, successors, and assigns, and does not extend to any other person.

XII. RESERVATIONS OF RIGHTS

21. Plaintiffs reserve, and this Decree is without prejudice to, all rights against Defendants with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiffs in Paragraph 20. Notwithstanding any other provision of this Decree, Plaintiffs reserve, and this Decree is without prejudice to, all rights against Defendants with respect to:

a. liability for failure of Defendants to meet a requirement of this Decree;

b. liability for costs of response incurred or to be incurred by Plaintiffs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606, and

d. criminal liability to the United States or State.

XIII. REOPENERS

22. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, and this Consent Decree is without prejudice to, the right to institute proceedings against any Defendant in this action or in a new action for:

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a. Claims based on a failure of Defendants to satisfy the requirements of this Consent Decree; and

b. Additional claims for Natural Resource Damages if conditions, factors or information 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 that there is injury to, destruction of, or loss of natural resources of a type unknown, or of a magnitude significantly greater than was known, at the time of entry of this Consent Decree, which is attributable to a Defendant. For purposes of this Paragraph, information known to the Trustees shall consist of any information in the files of, or otherwise in the possession of, any one of the individual Trustees, or their contractors or consultants, who worked on the Trustees' natural resource damages assessment, or any of the documents referenced in Recital C. above.

XIV. COVENANT NOT TO SUE BY DEFENDANTS

23. Defendants each covenant not to sue and agree not to assert any claims or causes of action against the United States, the State, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe or their contractors or employees, for any civil claims or causes of action relating to Natural Resource Damages.

XV. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

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

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Party hereto.

25. The Parties agree, and by entering this Consent Decree this Court finds, that each Defendant is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW 70.105D.040(4)(d) for Natural Resource Damages.

26. Each Defendant agrees that it will notify the Trustees and the United States in writing no later than 60 days before bringing a suit or claim for contribution for Natural Resource Damages. Each Defendant also agrees that it will notify the Trustees and the United States in writing within 10 days of service of a complaint or claim upon it relating to a suit or claim for contribution for Natural Resource Damages. In addition, Each Defendant will notify the Trustees and the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial for matters related to this Decree.

27. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for injunctive relief, recovery of response costs, or other appropriate relief other than Natural Resource Damages, each Defendant 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; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraphs 20 and 23.

XVI. NOTICES AND SUBMISSIONS

28. Whenever notice is required to be given or a document is required to be sent by one

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Party to another under the terms of this Decree, it will 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. Written notice as specified constitutes complete satisfaction of any written notice requirement of the Decree for Plaintiffs and Defendants.

As to the United States and as to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(DJ # 90-11-2-1049)

As to NOAA:

Robert A. Taylor
NOAA Office of General Counsel GCNR/NW
7600 Sand Point Way NE
Seattle, WA 98115-0070

As to the United States Department of the Interior:

Jeff Krausmann
U.S. Fish & Wildlife Service
510 Desmond Dr. SE, Suite 102
Lacey, WA 98503-1263

As to the State:

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

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As to the Puyallup Tribe of Indians:

Bill Sullivan
Environmental Department
Puyallup Tribe of Indians
3009 Portland Avenue
Tacoma, WA 98404

As to the Muckleshoot Indian Tribe:

Mr. Rob Otsea
Office of the Tribal Attorney
Muckleshoot Indian Tribe
39015 172nd Avenue S.E.
Auburn, WA 98002

As to Defendants:

Frank Williamson
Foss Maritime Company
660 West Ewing Street
Seattle, WA 98119-1587

William F. Joyce
Salter Joyce Ziker, P.L.L.C.
1601 Fifth Avenue, Suite 2040
Seattle, WA 98101

XVII. EFFECTIVE DATE

29. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XVIII. RETENTION OF JURISDICTION

30. This Court will retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Decree.

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XIX. INTEGRATION/APPENDICES

31. This Decree and its appendices constitute the final, complete, and exclusive agreement and understanding with respect to the settlement embodied in this Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree. The following appendices are attached to and incorporated into this Consent Decree:

Appendix A Order Directing the Deposit of Natural Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No. C93-5462B (W.D. Wash. Oct. 8, 1993).

Appendix B Cooks Marine Dock Site

Appendix C Form of real property use restrictions

Appendix D Form of real property use restrictions notice

XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

32. This Decree will be lodged with the Court for a period of not less than 30 days for public notice and comment. The Plaintiffs each reserve the right to withdraw or withhold their consent if the comments regarding the Decree disclose facts or considerations that indicate this Decree is inappropriate, improper, or inadequate. Defendants consents to the entry of this Decree without further notice.

33. If for any reason this Court declines to approve this Decree in the form presented, this agreement may be voided 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.

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XXI. SIGNATORIES/SERVICE

34. The Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice and each undersigned representative of the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and Defendants certifies that he or she is authorized to enter into the terms and conditions of this Decree and to execute and bind legally the Party that he or she represents to this document.

35. Defendants each agree not to oppose entry of this Decree by this Court or to challenge any provision of this Decree unless any Plaintiff has notified Defendants in writing that it no longer supports entry of the Decree.

36. Each Defendant will identify on the attached signature page the name and address of an agent who is authorized to accept service of process by mail on behalf of it with respect to all matters relating to this Decree. Each Defendant agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons.

XXII. DISPUTE RESOLUTION

37. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree.

38. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Trustees and Defendants. The period for informal negotiations shall not exceed twenty-one (21) days from the time the dispute arises, unless the parties agree otherwise in writing. The dispute shall be considered to have arisen

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when the Trustees send Defendants a written notice specifying the nature of the dispute and requested relief ("Notice of Dispute") or Defendants send the Trustees a written Notice of Dispute.

39. a. If the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Trustees shall be considered binding unless, within twenty-one (21) days after the conclusion of the informal negotiation period, Defendants invoke the formal dispute resolution procedures of this Section by serving on the Trustees a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Defendants.

b. Within twenty-one (21) days after receipt of Defendants' Statement of Position, the Trustees shall serve on Defendants their written Statement of Position, including, but not necessarily limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Trustees.

c. An administrative record of the dispute shall be maintained by the Trustees and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section.

d. The Formal Dispute Resolution Representatives for Defendants and the Trustees shall meet to discuss the matter in dispute at the earliest available opportunity and will work in good faith to resolve the matter in dispute. If the Parties fail to resolve the dispute within twenty-one (21) days after the initial meeting of the Formal Dispute Resolution Representatives, then the position advanced by the Trustees in their Statement of Position shall be considered binding upon Defendants, subject to any agreements the Formal Dispute Resolution Representatives may have

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reached on one or more issues and further subject to Defendants' right to seek judicial review pursuant to the following Subparagraph. In such event the Trustees shall within five (5) days of the conclusion of the formal dispute resolution process notify Defendants in writing that the formal dispute resolution process has concluded.

e. Any matter in dispute shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Defendants with the Court and served on all Parties within twenty-one (21) days of receipt of the Trustees' letter notifying Defendants of the conclusion of the formal dispute resolution process. The motion shall include a description of the matter in dispute, the relief requested and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Plaintiffs may file a response to Defendants' motion within twenty-one (21) days of receipt of the motion or within any different time frame that the local rules of court may provide, and Defendants may file a reply brief within five (5) days of receipt of the response or such different time that the local rules of court may provide.

f. The Court may rule based on the written record, with or without oral argument. The burden of proving entitlement to the requested relief with respect to the matter in dispute shall be on the Party requesting it.

g. The foregoing notwithstanding, the Parties acknowledge that disputes may arise that require resolution on an expedited basis. In such cases, the Parties shall agree on an expedited schedule or, absent prompt agreement, either Defendants or the Trustees may petition the Court for the imposition of an expedited schedule.

40. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of any Party under this Consent Decree not

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directly in dispute or contingent on issues in dispute, unless the Trustees or the Court agrees otherwise. Defendants' obligation to pay stipulated penalties as provided in Section X with respect to the dispute matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, the obligation to pay stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree, subject to agreement of the Parties or to the decision of the Court on Defendants' motion. If Defendants do not prevail on a disputed issue, stipulated penalties shall be assessed and paid as provided in Section X.

XXIII.MODIFICATION

41. No material modifications shall be made to any requirement under this Consent Decree without written notification to and written approval of the United States Department of Justice and the Trustees, Defendants, and the Court. Modifications to the Consent Decree exclusive of appendices incorporated within that do not materially alter the terms of this Consent Decree may be made by written agreement between the United States Department of Justice, the Trustees and Defendants. Modifications to any of the appendices to this Consent Decree that do not materially alter any of the terms of this Consent Decree may be made by written agreement between the Trustees and Defendants.

XXIV.TERMINATION

42. This Decree shall terminate upon written notice, made in accordance with Section XVI, by Defendants to all Plaintiffs that all actions required under Section VII have been taken, all payments required under Section VIII have been made, and all other applicable requirements of this Decree have been fulfilled, and subsequent written notice by the United States confirming

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the performance by Defendants of their obligations under this Decree. Such notice by the United States shall be sent within 45 calendar days of receipt by all Plaintiffs of the required payments and notice from Defendants. If the United States fails to send such notice, this Decree shall terminate automatically on the 46th day following receipt by all Plaintiffs of the required payments and notice from Defendant. The following provisions of this Decree shall survive termination: Section VII ("Conveyance of Cooks Marine Dock Site"); Section XI ("Covenant Not To Sue By Plaintiffs"); Section XII ("Reservation of Rights"); Section XIII ("Reopeners"); Section XIV ("Covenant Not To Sue By Defendants"); Section XV ("Effect of Settlement/Contribution Protection"); and Section XXII ("Dispute Resolution").

XXV. FINAL JUDGMENT

37. Upon approval and entry of this Decree by the Court, this Decree will constitute the final judgment between and among the United States, the State, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, and Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 23 DAY OF May 2011.

United States District Judge

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THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, et al. v. Foss Maritime Company and Marine Industries NW, Inc.

FOR THE UNITED STATES OF AMERICA

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

Date: 04/06/11

__/s Michael J. McNulty_____

MICHAEL J. McNULTY
Senior Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044 - 7611
202-514-1210

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FOR THE STATE OF WASHINGTON

Date: 11/22/10

Ted Sturdevant by Polly Zehm

Ted Sturdevant
Director
Department of Ecology

Date : 9/28/10

J Marchioro

Joan Marchioro
Assistant Attorney General
State of Washington

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FOR THE PUYALLUP TRIBE OF INDIANS

Date: 10/13/10

Herman Dillon, Sr.
Tribal Council Chair

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FOR THE MUCKLESHOOT INDIAN TRIBE

Date: 11-5-10

Virginia Cross
Tribal Council Chair

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FOR FOSS MARITIME COMPANY

Date: 10/12/10

J. C. Faber

Gary Faber
President & Chief Operating Officer

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FOR MARINE INDUSTRIES NORTHWEST, INC.

Date: 10/15/10

Don A Slater
President

Agent authorized to receive service of process by mail on behalf of Defendants with respect to all matters relating to this Decree:

William F. Joyce
Salter Joyce Ziker, P.L.L.C.
1601 Fifth Avenue, Suite 2040
Seattle, WA 98101

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